

Neutral Citation Number: [2011] EWHC 2748 (Admin)

Case No: CO/6665/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/10/2011

Before :

ELISABETH LAING QC
Sitting as a Deputy Judge of the High Court

Between :

The Queen on the application of 'BA'	<u>Claimant</u>
- and -	
Secretary of State for the Home Department	<u>Defendant</u>

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Tim Buley (instructed by Bhatt Murphy) for the Claimant
Mr Robert Kellar (instructed by Treasury Solicitors) for the Defendant

Hearing dates: 30 September and 7 October 2011

Judgment
As Approved by the Court

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ELISABETH LAING QC :

1. The Claimant, BA (“BA”) applies for permission to apply for judicial review, and for judicial review, of a decision of the Defendant (“the Secretary of State”) on 9 December 2010 to detain him pending deportation, and of subsequent decisions to maintain that detention. BA claims a declaration that his detention was and is unlawful, an order quashing the decisions to detain, and damages. This is my decision on those applications after a rolled-up hearing on 30 September and 7 October 2011. I granted permission at the end of the hearing on 7 October, and reserved judgment.
2. BA challenges those decisions on four broad grounds:
 - a. The Secretary of State failed to comply with her policy about detention. There are two aspects of this:
 - i. The Secretary of State has failed to carry out detention reviews as required by her Enforcement Instructions and Guidance (“EIG”).
 - ii. Where reviews were conducted, the Secretary of State failed to apply her policy about detention of those suffering from mental illness.
 - b. BA’s detention breaches the principles in *R v Governor of Durham Prison ex p Hardial Singh* [1984] 1 WLR 704.
 - c. BA’s detention is contrary to articles 2, 3, 5 and 8 of the European Convention on Human Rights (“the ECHR”) because it has exposed him to intense distress, and because the Secretary of State has failed to monitor his condition properly.
 - d. If BA’s detention is compatible with the the Secretary of State’s current policy, that policy is unlawful. This last ground has not been developed in argument. There is another case pending in which this issue is due to be decided, and I say no more about it. Mr Buley has indicated that he reserves his position on this point, should this case go further.
3. I was also asked to decide, if BA’s detention for any period was unlawful, whether he is entitled to damages, and if so, whether he is entitled to more than nominal damages. In other words, I have to decide, in relation to any period of unlawful detention, whether the Secretary of State, acting lawfully, could and would have detained BA.
4. An issue which is raised by this application is the effect of paragraph 2(1) of Schedule 3 to Immigration Act 1971 (“the 1971 Act”). This question was not raised in the skeleton arguments of counsel, but I asked for, and received, helpful oral submissions from both sides about it. There is little authority on this point. There is an obiter passage in the decision of the Court of Appeal in *WL (Congo) v Secretary of State for the Home Department* [2010] EWCA (Civ) 111; [2010] 1 WLR 2168, and two first instance decisions, which I consider further below.
5. There are two recent decisions of the Supreme Court on the scope of paragraphs 2(2) and 2(3) of Schedule 3 (*R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2011] 2 WLR 671, and *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299). One question I have to decide is whether the reasoning in those cases applies to detention pursuant to paragraph 2(1).
6. If it does, then if any of the decisions about detention breach the Secretary of State’s policy governing detention, and the breach bears on, and is relevant to, BA’s

detention, that decision would be susceptible to judicial review, but would also found a claim in tort (for false imprisonment). If the reasoning in those cases does not apply to detention under paragraph 2(1), then Mr Kellar, for the Secretary of State, concedes, any flawed decision would be unlawful, and susceptible to judicial review but, he argues, it would not found a claim in false imprisonment, because that unlawfulness would not undermine the statutory warrant for detention in paragraph 2(1). I also have to consider the effect of the *Hardial Singh* principles on the statutory warrant for detention in paragraph 2(1).

7. This judgment is arranged in the following sections:
 - a. The factual background
 - b. The decisions about detention in this case
 - c. The legal framework (including my decisions on the legal issues)
 - d. Discussion
 - e. Conclusion.

A. Factual Background

8. A witness statement was served by the Secretary of State on the afternoon before the first day of the hearing. Mr Buley did not object to its late service, and I allowed the Secretary of State to adduce it, for what it was worth. It did little more than to set out some of the history, by reference to the documents. The burden lies on the Secretary of State to justify BA's detention. I have had that in mind when making my findings on the issues. Many of the decisions in this case were taken by officials employed by the United Kingdom Border Agency ("UKBA") on behalf of the Secretary of State.
9. The detailed sequence of events has been helpfully pieced together, from documents disclosed by the Secretary of State, by BA's representatives, and presented as a chronology with extracts from that disclosure. The disclosure consists of a range of different documents; medical notes, emails, faxes, letters, and notes on a computer file called a GCID. This stands for "General Case Information Database". I have drawn heavily on that chronology for the purposes of writing this judgment, and am grateful to BA's legal team for preparing it. The Secretary of State and the Treasury Solicitor appear fully to have discharged their obligations to disclose the underlying documents. Some of these documents do not show her, or her officials, in a flattering light, but they have, despite that, and properly, been disclosed.

(1) BA's arrival and arrest

10. BA is a Nigerian national. He arrived at Gatwick Airport on 9 December 2005. He had a valid student visa. He was arrested for attempting to import 644g of cocaine, with an estimated street value of £48,000. The cocaine was hidden in his body.

(2) BA's conviction and sentence

11. On 18 May 2006, he was convicted at Isleworth Crown Court, after a trial, of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a Class A drug. He was sentenced by HHJ Lowen to 10 years' imprisonment. In his sentencing remarks, HHJ Lowen said that he was sentencing BA on the basis that he was a courier. HHJ Lowen recommended that BA be deported at the end of his sentence.
12. BA appealed on 9 June 2006. His appeal against his sentence was dismissed in due

course. The custodial part of his sentence of imprisonment came to an end on 11 December 2010.

(3) steps taken in connection with the deportation of BA

13. On 10 December 2005, the Secretary of State served on BA a letter notifying him of his liability to be deported. A further letter, IS151F, was served on BA on 17 April 2007 at HMP Rye Hill, informing him of his liability to be deported. The relevant form records that BA refused to sign it. The letter was served again on 11 June 2007.
14. Further IS151F forms were served on BA on 17 August 2008, and on 11 November 2008. The latter said that “liability for deportation (automatic deportation) was sent to you at HMP Ranby which you duly completed”.
15. On 9 September 2010, UKBA sent an ICD 0350 letter to BA. This notified him that he was liable to be deported. It invited him to make representations why he should not be deported. It said that BA’s mental condition meant that he was excepted from the automatic deportation regime (see section 33(6)(c) of the UK Borders Act 2007). A completed ICD1070 notice was received by UKBA on 22 November 2010. This included a detailed statement from BA explaining his asylum claim; I say more about this aspect of the case below.
16. In October 2010, Gatwick RFU submitted an application for an emergency travel document (“ETD”) to the Nigerian High Commission. BA’s Nigerian passport had, by that stage, expired.
17. On 9 December 2010, UKBA faxed several forms to BA, care of his responsible clinician, including an ICD1070, an ICD1914, an ICD1913, and appeals forms.
18. According to UKBA, BA was detained pending deportation under Schedule 3 on 1 February 2011, the date when he was transferred to Harmondsworth Immigration Removal Centre (“IRC”) (see further, below). He was on that date notified of a decision to make a deportation order, and detained pending the making of the deportation order. However, there is an issue about when his detention under immigration powers began. I say more about this, too, below. It is also contended by Mr Buley, for BA, that the decision to make a deportation order was unlawful, as, at that stage, BA had an outstanding asylum claim. I do not need to decide whether this contention is correct. There is a statutory bar on the removal of a person who has made an asylum claim if that claim has not been decided.
19. On 17 February 2011, BA completed forms for an ETD. A telephone interview with the Nigerian High Commission was required, and one was arranged for 24 February 2011. However on 24 February BA said that he wanted his solicitor to be present. The interview was not completed.

(4) BA’s asylum claim

20. An IS151F dated 17 August 2007 records that BA’s “then representatives” had written to UKBA stating that BA did not wish to return to Nigeria, and that he wished to claim asylum. It goes on to note that “your asylum claim was not considered at this time”. There is a letter on the Home Office file from CK Solicitors to UKBA dated 17 August 2007 saying that BA was unwilling to return to “his country for a well

founded fear of persecution and as such wishes to claim asylum....Please treat as a matter of priority". The Secretary of State has not explained why nothing seems to have been done in response to this letter. Mr Kellar submits that it can be inferred that the reason was because BA was already starting to show signs of mental illness. On the evidence, I am unable to find that that is the case. I accept that it is sensible, in most cases, however, not to consider issues such as asylum, and whether a deportation order is appropriate, until a prisoner is close to the end of the custodial part of his sentence (cf *Chindamo v Secretary of State for the Home Department*; a decision of the Immigration Appeal Tribunal, dated 21 December 2000).

21. On 21 October 2010, a letter from Dr Khalifa, who was treating BA, to Carol Jones, a probation officer, was copied to UKBA. This letter mentioned that BA had told the medical team that his life would be in danger in Nigeria from gangs as a result of his failed attempt to smuggle drugs in 2005. The team said that they had spoken to members of his family on the 'phone, who confirmed this.
22. On 15 November 2011, BA responded to the ICD0350 dated 9 September 2010. His response was that he did not want to go back to Nigeria and that he wanted to claim asylum. UKBA recorded his response in this way, "You made a statement in which you described the circumstances of your offence and stated you wished to claim asylum - you believed that your life would be in danger in Nigeria." The statement from BA which accompanied the form gave a detailed account of his reasons for fearing a return to Nigeria.
23. The caseworker's minute of the decision to detain BA dated 9 December 2010 records that while BA's "renewed claim for asylum is not for reasons covered by the Convention", that claim "must be substantively considered and this will be arranged as soon as he is transferred to immigration detention." The acting assistant director who gave authority to detain asked for the case to be allocated to a criminal casework directorate ("CCD") team, and said that "They will need to focus on the asylum issues that have been raised."
24. On 17 December 2010, Dr Jonathon, Dr Khalifa's assistant, sent a letter of appeal against the decision to make a deportation order to UKBA. It seems that BA's current immigration solicitors accept that this was not a valid notice of appeal. On 26 September 2011 BA's current immigration solicitors lodged notice of appeal out of time with the First-tier Tribunal ("the FTT"). On 3 October 2011, the FTT exercised its power to extend time for the lodging of that notice of appeal. It is not clear when the appeal will be heard, or what issues the FTT will consider, as this is still a case where the Secretary of State has made no decision on the asylum claim.
25. A form IS151F dated 17 February 2011 records, "...you were seen at Harmondsworth [Immigration Removal Centre] to complete [Emergency Travel Document] forms. However you claimed that you had a problem and could not return to Nigeria. When questioned further you claimed that you are homosexual and also fear for your life." That form records, under the heading "Current barrier to removal" that "Your asylum claim needs to be resolved."
26. On 3 March 2011, Mr Paul Agbeni, an official with CCD, asked for a full asylum interview to be arranged. On 11 March 2011, BA was seen at Harmondsworth IRC to

complete asylum screening and a substantive interview. The file note records that he had been invited to this interview via the internal post, but had said he was not aware of the interview. BA said that he had new representatives, and gave their details. On 14 March 2011, UKBA received a letter of authority from Shan & Co. On 16 March Shan & Co asked for the asylum interview record.

27. On 8 April 2011, BA was again seen for an asylum interview. The official concerned decided not to interview him. He decided to re-book the interview for 15 April 2011. The IS151F dated 12 April 2011 reports this fact. The IS151F dated 26 April 2011 explains why the interview was not held. It states that BA appeared “disorientated and lethargic” and that “The subject also reported that his medication for his mental health had run out three days previously and that he was not able to see healthcare staff at his IRC”. The internal GCID note records, further, that the would-be interviewer had asked whether BA was feeling fit and well and ready to be interviewed, “which BA clearly was not”. The note continued, “subject came to the centre from hospital and his psychiatric condition is acknowledged on IS91RA”.
28. As I noted above, BA now has an outstanding appeal against the decision to make a deportation order.

(5) BA’s first transfer to hospital

29. On 14 January 2009, while BA was still in prison pursuant to his sentence, the Secretary of State for Justice made an order under section 47 of the Mental Health Act 1983 (“the 1983 Act”), transferring BA from HMP Nottingham to the Cygnet Hospital, a low secure unit. On 15 January 2009 BA was duly transferred, and UKBA were notified of this.

(6) BA’s transfer to the Wells Road Centre

30. BA was transferred to the Wells Road Centre on 3 August 2009.

(7) BA’s return to HMP Nottingham

31. On 5 January 2010, Dr Khalifa wrote to the Secretary of State for Justice, asking that BA be discharged from the order made under section 47. BA’s anti-psychotic medication had been stopped in early September, and since then the medical team had seen no symptoms of mental illness. The team’s view was that BA’s psychotic episode had “resolved”, and that he no longer suffered from a mental disorder of a nature and degree which that warranted treatment in hospital.
32. On 25 January 2010, BA was returned to HMP Nottingham. His mental condition deteriorated. His psychosis appeared to have returned by 18 February 2010.

(8) BA’s second transfer from prison

33. On 17 March 2010, Dr Lloyd completed a second report under section 47 of the 1983 Act. The relevant documents were faxed to the Ministry of Justice. On 18 March 2010, the Ministry of Justice issued a warrant for BA’s transfer. As soon as a bed became free, BA was re-admitted to the Wells Road Centre. He remained there until he was transferred to Harmondsworth IRC on 1 February 2011.

(9) BA’s mental illness while in prison

34. This is set out at some length in BA’s chronology. BA first appeared ill in October

2008. He was transferred to HMP Nottingham in December 2008, where there was 24-hour health care, because he was displaying symptoms of psychosis. His condition deteriorated, and he began to refuse food. By January 2009 it was clear that he needed urgently to be admitted to hospital under section 47 of the 1983 Act, and that was promptly done. UKBA were notified that he had been so transferred, and his case was referred to UKBA's mentally disordered offenders team ("the MDO"). A report in May 2009 indicated that there was a risk of deterioration if he were returned to prison. He was thought to be a low risk to others, but there was a risk that he would harm himself.

35. On 30 June 2009, his case was transferred to Juliana Edwards, of the MDO. The GCID of that date records, "If [BA] is still in hospital any time near his [conditional release date, 11 December 2010] he will be likely to be [detained by UKBA] and [MDO] will proceed with deportation action." BA was transferred from one unit to another on 3 August 2009. The discharge summary relating to that transfer, dated 21 August 2009, predicted that BA would remain well if he took his medication. "His prognosis" the summary went on, "in a hospital setting is good but because of lack of insight he would discontinue his treatment in prison and his mental state would deteriorate to dangerous levels where there are significant health risks."
36. His medication was stopped and he was kept under observation in September 2009. The improvement in his condition led Dr Khalifa to recommend that he be discharged from section 47 on 5 January 2010. He considered that BA's psychotic episode had resolved. BA went back to prison on 25 January 2010. He began to behave oddly on being told that he was to be returned to prison. Once he had returned, he quickly showed symptoms of psychosis. On 11 March he was seen, his mental state seemed better, but he appeared dehydrated and seemed to have lost weight. The psychiatrist who saw him considered that there was a "risk that he may be psychotic and masking symptoms" and that it would be a good idea to transfer him to hospital to observe him there.
37. He was so transferred, again pursuant to a transfer order made under section 47, on 26 March 2010. At that point, his behaviour suggested psychosis and he was not eating or drinking properly. At Dr Khalifa's suggestion, BA was seen by a Nigerian psychiatrist in order to investigate whether he was feigning his symptoms. Dr Atere said that he suspected that BA "did indeed have stress-induced psychosis", but could not elicit any evidence that he was suffering from a psychotic illness.
38. In a letter to a probation officer, dated 21 October 2010, Dr Khalifa referred to BA's history of developing psychosis in prison which had required his admission to hospital, and to the facts that he had been treated in hospital and returned to prison on 25 January 2010, and that his mental condition had deteriorated again, and he had stopped eating and drinking, and had been admitted to the Wells Road Centre. He said that BA "suffers from a major mental disorder and is prone to relapse, particularly under stress". He emphasised that it was important that all the agencies currently involved in BA's case should communicate with one another. This letter was copied to UKBA.
39. On 25 October 2010, Juliana Edwards emailed Kerry Devine, a social worker at the Wells Road Centre in Nottingham, where BA was then detained. She referred to a

conversation with the social worker in August 2010, in which the social worker had said that she was concerned that “[BA] would soon be well enough to be remitted back to prison but that when he returns to prison he deteriorates quickly and ends back in hospital. You said that if [BA] is to be deported, it would be better for him to be deported directly from hospital. I informed you that in order for us to begin consideration of his deportation we would need an assurance from his responsible clinician that he is fit to travel and well enough to be considered for discharge.”

40. The second detention review records that on 3 November 2010 BA’s responsible clinician had suggested to CCD that he intended to discharge BA on the day his prison sentence expired. The GCID on 3 November reports a discussion between the social worker and Dr Khalifa, in which he said that BA was stable, and could be remitted to prison before his conditional release date, but that Dr Khalifa “was very concerned that [BA] usually relapses very quickly once in prison and so they do not send him back to prison. They have suggested ...that they intend to discharge him on the day after his prison sentence expires and that we should take him and immigration detain him on the same day.”
41. A mental health assessment on 19 November 2010 gave a list of symptoms when BA’s mental health deteriorates. They included refusal of food, self neglect, non-compliance with medication, and muttering to himself. He was assessed to be a low risk of absconding. The record of a care programme approach (“CPA”) review on 24 November 2011 notes that Dr Khalifa stressed that treatment planning was important. He confirmed that BA had not harmed himself or others in prison. He said that “the main risk for [BA] is that of starvation if he again refuses food or drink as he has in the past within prison when he was unwell. The only other problemwould be if [BA] were to stop taking his medication.”
42. On 25 November 2010, Dr Khalifa emailed Juliana Edwards. He said that BA’s diagnosis was stress-induced psychosis. He named BA’s anti-psychotic medication. He said, “The main concern is that his mental state would deteriorate rapidly if he is under stress. He would undoubtedly require psychiatric follow-up on his discharge from hospital. “I will be prepared ... to share ... information with psychiatric services ... should a psychiatric team be identified.”
43. The IS91RA dated 9 December 2010 records Dr Khalifa’s opinion that “food and fluid refusal, psychiatric disorder, racism/bullying in prison” were risk factors. It stated, “The main risk is that of deterioration in his mental health and relapse of his psychosis. When psychotic he will refuse food and drink and will become dehydrated. The risk of relapse is greater when he is under stress and off his medication (Olanzapine)”.
44. The salient point is that BA became psychotic in prison conditions, and when ill, refused food and drink. He was transferred from prison to hospital, not once, but twice, for these reasons. On his return to prison after his first hospital stay, his condition deteriorated so quickly that he had to be re-admitted to hospital again, after just three months in prison. The Secretary of State was, or should have been aware of this history, since it is documented in the disclosure provided by the Secretary of State in these proceedings. Moreover, Dr Khalifa, in his communications with her, provided Juliana Edwards of MDO with full information about BA’s condition, and the risks

which were entailed by detention for his mental, and physical, health.

(10) the transition between hospital and Harmondsworth IRC

45. On 10 December 2010, Dr Khalifa emailed Juliana Edwards. He said that she should feel under no pressure to collect BA on 13 December. He was prepared to keep BA in hospital until January if necessary, “to allow your team to process his detention under the Immigration Act properly and to allow us to put in place a follow-up plan.” He understood that “professionals from the health unit at the Immigration Centre will be contacting us before BA is removed.” He noted that BA’s restriction order would expire on 11 December 2010. This would allow Dr Khalifa to discharge him from his section 47 detention and to enable his detention under the Immigration Act.
46. It appears that initially UKBA tried to find a healthcare bed for BA in one of their IRCs, but that no such bed could be found.
47. The documents disclosed by the Secretary of State show that the healthcare unit at Harmondsworth IRC were asking for more information about BA’s condition. On 14 January 2010, Juliana Edwards emailed Osman Nazir, a probation officer. She said that she had provided Harmondsworth IRC with “all the necessary answers”. Harmondsworth, she continued, “seem to be concerned that when he becomes mentally ill, he does not eat or drink”. She said she was waiting for Harmondsworth IRC “to formally accept him, which ultimately, they will have to, since [BA] is currently stable and the hospital need the bed. Additionally, he is court recommended for deportation and UKBA do not want him discharged into the community as I have already obtained authorisation for his detention.” (original emphasis).
48. A note on the GCID on 18 January 2011 records that Harmondsworth IRC were willing to receive BA provided that he was compliant with his medication and no longer suffering from mental illness. They were concerned, however, that removal directions should be set as soon as possible, “as there is a note somewhere that BA’s medical condition deteriorates quickly in a prison environment”. They were also concerned about a contingency plan, as “they do not want to be left with him on a long-term basis”.
49. An email exchange on 19 January 2011 between Juliana Edwards and others records that someone had asked when removal directions would be set, and what the contingency plan was if removal failed as Harmondsworth IRC did not want to be left with BA on a long-term basis. The response was that a precise date for removal directions could not be given, but that BA might shortly become ARE (appeal rights exhausted); he did have an outstanding asylum claim which had to be resolved, but “I think that could be dealt with quite quickly”.
50. On 27 January 2011, a fax from Juliana Edwards states that Dr Khalifa was not planning to hand BA over to another psychiatrist, but that he planned to contact the healthcare unit at Harmondsworth IRC in order to provide a full hand-over, including BA’s records. BA’s discharge summary said that “the stress of his imprisonment was the cause of decompensation and presentation with a psychotic illness. He is now apsychotic and euthymic. Further management of his case is complicated, as he is the responsibility of various agencies acting independently.” BA’s diagnosis was “stress-induced psychosis”. On 1 February 2011 he was transferred to Harmondsworth IRC.

Since he was no longer detained under the 1983 Act, he ceased to be the responsibility of the MDO.

51. The documents I have seen show that Dr Khalifa did not discourage the transfer of BA from hospital to immigration detention (see, for example, an email he sent on 10 January 2011 to BA's probation officer, which was copied to UKBA). However I do not consider that Dr Khalifa can be assumed to have endorsed immigration detention as a suitable setting for BA. In my judgment his opinion was that as BA was well, he could not any longer justify BA's detention in a hospital under the 1983 Act. In my judgment it was for the Secretary of State to satisfy herself that BA's detention under the 1971 Act was justified, by reference to her policy and other relevant matters.

(11) the healthcare available at Harmondsworth IRC

52. There are various reports in the documents I have seen which deal with the configuration of Harmondsworth IRC, and with the staffing of, and facilities in, its healthcare unit. Harmondsworth IRC consists of "prison-style wings" and "hostel-type" accommodation. I consider it improbable that BA was detained in the latter. In 2010, it had capacity for 615 detainees.
53. The healthcare provided there was the subject of a "damning report" by an HM Chief Inspector of Prisons at the start of 2010. Many complaints were made by inmates, and a "recurrent theme" was the uncaring attitude of healthcare staff. During 2010, progress to improve had been slow. The induction and departure unit was overstretched. The provision for mental health was criticised, and said to require "urgent attention". The report made 60 recommendations which were accepted by UKBA, but by the end of 2010, only 22 had been fully put into effect. A report by the local primary care trust argued for better co-ordination between UKBA and the NHS. It identified increasing issues about mental health.
54. By the end of 2010, detention staff were still seen as more "caring" than healthcare staff. Each month, 30-40% of healthcare appointments were missed by detainees, including external appointments. At the end of 2010, Harmondsworth IRC's independent monitoring board expressed continuing concern about the care of those with mental health needs. Detainees with significant such needs "sometimes languish in Harmondsworth because external beds cannot be found for them, or because their needs, while significant, do not warrant their being sectioned.... This is distressing for them, for staff, and for other detainees." No counselling services were available.
55. There are 3 wards in the healthcare unit, with 6 beds each. In early 2010, two of those were being used for non-healthcare reasons. The permanent staff, including the manager, are all nurses. There were ten nurses, including, either one, or two with mental health training, but in early 2010, there was no dedicated registered mental health nurse. There were no nurse prescribers. The staff available include a GP who visited daily (but not, according to one report, at weekends), and was on-call at other times, and a psychiatrist, who visited once a fortnight. Detainees with an urgent psychiatric need could be seen "within a maximum of two weeks". There were no psychologists, counsellors, or other therapists. A report in early 2010 noted that record-keeping was poor. The same report observed that outside appointment hours, detainees were discouraged from going to the healthcare unit.

(12) BA's condition during his detention in Harmondsworth IRC

56. To judge from the documents, BA was not monitored at all by the healthcare unit at Harmondsworth IRC after his induction by a nurse on 1 February 2011. As I have indicated, in March and early April 2011 there were attempts to interview BA for an ETD and about his asylum claim. The first medical record is a manuscript health record entry for 31 March 2011. This records that BA was reviewed, and appeared to be relapsing gradually. The recommendation was that his dose of olanzapine should be increased and that a psychiatrist should review BA on his next visit. BA was advised to go to the healthcare unit if he found it difficult to cope.
57. I have set out at paragraph 27, above, what happened on 8 April when an official tried to interview BA about his asylum claim, and the view which that official formed. It is of concern that when BA had been seen on 31 March, his condition had been seen to be getting worse, but that a little more than a week later, he was obviously unwell to a layman, and was saying both that his medication had run out three days earlier, and that he had not been able to see the healthcare staff. This suggests that no-one was keeping an eye on his welfare, despite the warning signs seen on 31 March 2011. This is all the more worrying when it is recalled that incarceration, stress, and lack of medication were factors which had led to BA's becoming ill in the past. The GCID note for 8 April 2011 says "subject came to the centre from hospital and his psychiatric illness is acknowledged on IS91RA". On 11 April 2011, the healthcare unit at Harmondsworth IRC were asked for an assessment of BA's mental health. There was then to-ing and fro-ing about consent forms.
58. BA was reviewed by the Harmondsworth IRC GP on 15 April 2011. He noted that "from some misunderstanding, he has not been prescribed his olanzapine". The plan was for him to be seen by a psychiatrist.
59. On 27 April 2011, Mr Agbeni wrote to the healthcare unit at Harmondsworth IRC. He asked them to confirm that BA was fit to be interviewed about his asylum claim, and if not, "please provide me with a specific, time-bound plan within which the subject will be fit to be interviewed." He also asked for an assessment of BA's current mental health, his medication, and "the regularity of his appointments with the psychiatric doctor by return." Manuscript medical notes for 10 May 2011 record that an appointment to see the doctor was booked for BA for 12 May 2011 "as requested by UKBA". He was reviewed by a GP on 12 May 2011. He reported that BA was "disoriented, lying on the floor, keeps repeating 'I see demons'. H/O schizophrenia/on Olanzapine...Already on the waiting list to see psychiatrist (20.5.11)."
60. He was not seen by a psychiatrist until 21 May 2011, some 7 weeks after his symptoms appeared. This seems to have been his first encounter with a psychiatrist since his arrival at Harmondsworth IRC. His behaviour and speech were erratic and he was expressing paranoid ideas. The psychiatrist recorded a differential diagnosis of either situational stress with malingering, or stress-induced psychosis. According to the Secretary of State's records, on 21 May 2011 BA apparently moved to the healthcare wing at his own request "because he was not feeling well". Mr Agbeni, his caseworker was told this.
61. On 24 May 2011, Mr Agbeni sent a further letter to the healthcare unit asking for information about BA. The healthcare unit replied that day, saying that BA was not

attending for appointments for his fitness assessment and that BA had been referred to “mental health”. On 26 May 2011 there is a reference in the medical notes to the fact that BA was refusing food. A food refusal log was opened, after “3 days of missed GEO supplied meals.” On 27 May the manager of the healthcare unit wrote to Mr Agbeni to say that BA had been “re-referred” to mental health and until then was not fit for interview. On 28 May 2011, a daily up-date about BA’s food and fluid refusal was faxed to UKBA. This expressed “some” medical concern about BA’s wellbeing. The manuscript medical notes record that BA refused to get up to be weighed, as he said that he could not stand. On 30 May 2011, BA was seen by a GP who said that he was concerned about BA’s physical and mental state and “recommend[ed] removal to a hospital in the hope that an alternative healthcare environment might encourage him to accept intervention.”

62. On 1 June 2011, BA was admitted to Hillingdon Hospital, where, according to Dr Summers, BA told her, he had blood tests, nursing staff reported that he had intravenous fluids, but the hospital had as yet sent no information to Harmondsworth IRC. He was returned to Harmondsworth IRC within 24 hours. The meal log for 2 June 2011 said that BA had refused all meals and drinks, had not been seen by healthcare that day and was sent to Hillingdon A & E for rehydration. The GCID for that day records that the healthcare manager at Harmondsworth IRC said that BA had been to hospital the day before for rehydration, and that “for the moment he was stable”. However he was continuing not to eat or drink and was refusing to engage with the Harmondsworth doctor. The medical notes for 3 June 2011 say that BA refused to see a GP, Dr Farag.
63. On 3 June 2011 he was examined by Dr Summers, who was instructed by Medical Justice. She produced a report, dated 10 June 2011. She is a former GP with experience of treating patients suffering from mental illness. During the thirteen days before her assessment, BA was reported to have eaten nothing and to have drunk very little. He described a variety of apparently delusive experiences to her, such as voices in his head, from the internet and from the television: Obama and demons and spirits gathered in his room and wanted to kill him. She could not tell if he had lost weight. She said that his refusal of food and drink was a cause for concern, and that “it is unclear whether there is sufficient communication between hospital and healthcare staff to monitor his condition effectively”. Her opinion was that BA was anxious and depressed and had signs of psychosis. It would not be safe to assume that some of these were feigned. His psychological distress seemed genuine, and he needed “on-going assessment by mental health professionals”. He would be better managed in a hospital, and Harmondsworth IRC GP records agreed. He was not fit to be interviewed for his asylum claim, as his mental health was not stable. In sum, he had a history of stress-induced psychosis and was showing signs of a relapse. His physical and mental health were deteriorating and he should be transferred to hospital for treatment.
64. The medical notes for the same date ask, “Is he due to see a psychiatrist again?” and record that he needed help to shower. He was seen by a psychiatrist, Dr Burrin, on the same day. The medical notes record a diagnosis of stress-induced psychosis and depression, and say that BA should be referred to hospital for further assessment and treatment. He was referred to Colne Ward at the Riverside Centre for eventual assessment on 4 June, and was to remain on “healthcare level 3” until that assessment.

The same day, Mr Agbeni was sent a letter saying that BA was not fit for interview, had been seen by the duty psychiatrist, and referred for a possible admission to hospital under the 1983 Act.

65. He was reviewed by a GP on 5 June 2011. His view was “needs to be hospitalised”. The GP also thought that BA needed to be seen by a psychiatrist. The nurse said that immigration would be notified. They were. An urgent message was left and it was arranged that Dr Burrin would review BA that afternoon. A UKBA file note dated 5 June 2011 confirms that UKBA knew about this, and that the GP had wanted BA to go to hospital to be re-hydrated. BA had initially refused, but then agreed. He was taken to Hillingdon A & E again on 6 June 2011, discharged the same day, and “re-admitted to healthcare level 3” at Harmondsworth IRC. The meal log notes he took no fluids that day.
66. According to the medical notes for 11 June 2011, BA refused to eat or drink that day. He would not go to hospital. He was to be assessed each day. On 13 June 2011, he was reviewed by a GP, who thought BA was de-hydrated, looked unwell, and suggested that BA be referred to hospital. BA’s response was he would be killed there. The GP’s plan was to chase a referral to Hillingdon Hospital that day. The meal log records that BA did not eat or drink on 15 June 2011. This was the 24th day on which he had not eaten meals. He would not speak to healthcare staff. He was told that not eating and drinking can be fatal. Mr Agbeni wrote to the healthcare unit on 16 June 2011, asking for an up-date: had BA been seen by a mental health hospital. He asked whether BA was now fit for interview; when he would be fit; whether he had been sectioned, and when he would be sectioned “(if applicable)”.
67. BA was seen by Dr Burrin on 17 June 2011. His mood was low. He believed he was being persecuted by demons and was having auditory hallucinations. Dr Burrin’s plan was for BA to be assessed by the psychiatric team from Hillingdon Hospital. BA was refusing to talk or to let himself be examined. He was examined twice by a GP on 18 June 2011. He would not eat or drink. He looked frail, but was fully co-ordinated and coherent. On 18 June 2011, BA took some fluid with his medication. He took fluid with his medication on 19 June 2011 (300 ml). He was still refusing hospital admission, or to sign any paperwork. He was still refusing food and drink on 19 and 20 June 2011. He ate a little on 21 June 2011 and drank a little.
68. On 23 June he was refusing to eat and looked de-hydrated. 24 June 2011 was his 32nd day of food refusal. He refused, not for the first time, to give a urine sample. He refused to go to hospital. He was seen by Riverside mental health unit for an assessment. A psychiatric report was awaited. He did not eat or drink. He went to hospital for re-hydration that day. On each of the next three days he drank and had a small amount of Ensure, but on 28 June was not seen eating or drinking.
69. On 28 June 2011, BA was assessed by Dr Musah of Colne Ward, but he did not produce a report until 19 July 2011. That report noted that BA did not like going to A & E as he was put in handcuffs, which he found demeaning. Dr Musah’s opinion was that BA had “decompensated somewhat” since his transfer to Harmondsworth IRC. He believed that the deterioration was directly related to BA’s immigration issues and detention. The main risk was the harm to his physical health caused by his refusal of food and drink. That was “most likely due to his current circumstances”. The plan

was to admit him for a psychiatric and medication review for a standard period of 4-6 weeks, but no bed was available. He was second on the waiting list. He would then be returned to Harmondsworth IRC, as this acute unit did not have facilities for long-term psychological interventions.

70. On 29 June 2011, Dr Cheema stated that BA was unfit for “prolonged detention”, according to an email from Valerie Anderson, the interim healthcare manager at Harmondsworth IRC. BA declined to see a doctor that day. On 30 June 2011, Mr Agbeni wrote to the healthcare unit at Harmondsworth IRC enclosing a letter before claim sent by BA’s solicitors, Bhatt Murphy. Mr Agbeni sought to commission a medical report “(BA has been in and out of hospital recently)”. Mr Agbeni also asked for any alternatives to detention “you may or may not see, such as refinement [sic] to a secure mental unit (although there appear to be exceptional circumstances, such as the severity of the crime, to maintain detention)”.
71. The medical notes for the same day support the statement in the email I mentioned in the previous paragraph. BA is reported to have declined to see a GP, to be very dehydrated and not to be allowing assessment. He had been to hospital “multiple times” for re-hydration, last on 24 June. On 1 July 2011 the medical notes record that BA was still refusing food/drink, he had not passed urine for the last 48 hours, he looked weak and de-hydrated, and declined observations and examination. An urgent referral to hospital for intravenous fluid and further management was necessary but BA refused to go. He was not seen eating or drinking on 3 July 2011.
72. On 4 July 2011 Valerie Anderson wrote to Mr Agbeni. She said that BA had been assessed, but that there was no report from the psychiatrist yet. She said BA was unfit to be interviewed, and that it was impossible to predict when he would be fit to be interviewed. He was refusing to be sent to hospital for re-hydration. He was “today in such poor physical condition that he should now be considered unfit to be detained”. He could not be released into the community without first being re-hydrated, and his physical condition superseded any mental health problems. He was still refusing food and drink, refusing “healthcare interventions”, or to go to hospital to be re-hydrated.
73. Also on 4 July 2011, a report was sent to UKBA under rule 35 of the detention centre rules (2001 SI No 238), which requires a detention centre medical practitioner to “report to the manager the case of any detained person whose health is likely to be injuriously affected by continued detention”.
74. On 5 July 2011, the UKBA Deputy Manager at Harmondsworth IRC spoke at length to BA and persuaded him to go to hospital to be re-hydrated. He was still reported to be refusing to eat or drink, or to pass urine, and refusing to go to hospital.
75. On 6 July 2011, Dr Agulnik provided a preliminary psychiatric assessment. He formed the view that BA’s food refusal was related to his delusional ideas. His physical condition was “not my area of expertise....gives rise to grave concern, and without more intensive and sustained treatment, could result in a lethal outcome.” His physical and mental state made him unfit for continued detention, a “view supported by the Healthcare Manager”. The stress and uncertainty about his status had a role in his current “decompensation into a psychotic state”. Dr Agulnik considered it highly

unlikely that BA could be successfully treated in an immigration detention centre, and “indeed that continuing to do so courts a real risk that he could die.” He needed urgent psychiatric care which must be outside detention.

76. A file note on the same date indicates that UKBA knew that BA was considered unfit for detention, and that temporary release would be discussed with senior managers. BA had gone to hospital on 6 July and been given intravenous fluids. He had taken 50 ml of fluid that morning, but had passed no urine. Harmondsworth’s view was that he was still unfit for detention.
77. On 8 July 2011, NOMS provided a report on risk. The most current concern was risk of harm “to self”. The relapse of BA’s mental illness meant that the risk of harm to self was high. The risk of likelihood of reconviction was assessed as “low”. “The efficacy [sic; perhaps “reliability” is intended] of the score is somewhat compromised by there being only one previous conviction in the UK mainland.” The risk of reconviction for a similar offence in the United Kingdom was, in any event, assessed as low. However, given his circumstances, he could find himself in a position which could lead to further offending, given his lack of support in the community. The “risk of serious harm level” was “medium”. I have not been told what this assessment was based on. It seems unlikely, given BA’s condition, that it was based on an interview with him. It is more likely that it was a paper-based assessment. Nor is it apparent why the risk which it was assessed that he posed had been up-graded from that which had been assessed in 2008.
78. UKBA asked for this assessment on 8 July 2011. It is not clear why, but the request may have been prompted by a “Strategic Director referral for release” which was apparently emailed to an assistant director on 8 July. The new NOMS assessment is not referred to in the July detention review. It is first mentioned in the August review. Also on 8 July, BA was provisionally granted section 4 bail accommodation. This meant that, if released, he would have somewhere to live.
79. Dr Musah reported his plan to Valerie Anderson of Harmondsworth IRC on 20 July 2011. This report had by then been overtaken by events somewhat, as it was based on Dr Musah’s assessment of BA on 28 June 2011.
80. BA was examined by Dr Farag (a GP) on 22 July 2011. He had been observing BA for some time. BA was “clearly ... deteriorating progressively from bad to worse”. He and a colleague expressed their concern to Valerie Anderson. Dr Farag wrote to UKBA on the same day. He said that BA had not been eating or drinking much. His general condition was deteriorating; he looked “very weak, tired, de-hydrated and ill ... I am very concerned about his physical and mental health. I feel he is not fit for detention”. The medical notes for that day record that the Deputy UKBA Manager at Harmondsworth IRC had been contacted, and asked to come “ASAP” to help explain to BA that he should agree to go to hospital. He still refused to go, despite being told that he might not survive in order to be admitted to a psychiatric unit.
81. He continued to refuse to go to hospital on 24 July 2011. He looked frail and de-hydrated. He would not allow himself to be examined, would not give urine for his ketones to be checked, and refused to go to hospital. On 25 July, however, he was reported to be drinking Ensure. On 26 July 2011, there was an interim relief hearing

in front of HHJ Pearl QC, sitting as a Deputy High Court Judge. He ordered, among other things, the Secretary of State to take steps to arrange a transfer to a hospital under section 48 of the 1983 Act. BA again refused to go to hospital on that day.

82. On 28 July 2011, Valerie Anderson wrote to UKBA. She said that BA had not passed urine for 3 days. She felt a tremor when taking his pulse. In patients who have not passed urine, this can be caused by a build-up of urea. If that continued, BA's internal organs could be affected, and shut down. He was still refusing to go to hospital. Her letter continued, "Based on BA's presentation this morning and the decision to maintain detention despite two letters stating that he is unfit to be detained, I will now be formatting [sic] an end of life care plan for this gentleman."
83. Dr Burrun, a psychiatrist, saw BA on 29 July 2011. His assessment was that BA met the criteria for a transfer under section 48 of the 1983 Act. BA was still complaining that he was hearing demons who were ordering him not to eat and drink. He did, however, drink some water and Ensure. BA was told that he had been put on a waiting list for a bed in Colne Ward.
84. He was reviewed by a GP, Dr Ali, on 1 August 2011. He was alert and oriented, drinking occasional fluids, not talkative, and "objectively low".
85. On 3 August a bed became available at Colne Ward. In an email of 5 August, the hospital expressed surprise that Harmondsworth IRC had been told this on 3 August, and that they should organise the documents for a transfer under section 48. The hospital had been trying to call Harmondsworth IRC, but had not got through. The medical notes record that preparations were to be made, including a review by a GP and Dr Burrun, with a view to an urgent transfer to Colne Ward. Dr Burrun noted that BA remained "withdrawn, isolative, and physically frail." He drew up a section 48 report. A further report was drawn up the next day by Dr Ali. On 4 August Mr Agbeni visited BA. The section 48 paperwork was completed in the course of 5 August, and BA was finally transferred to Colne Ward on 6 August 2011.
86. On the morning of 21 September 2011, a CPA meeting took place on Colne Ward. BA's responsible clinician, Dr Shirolkar, said that his physical and mental state had improved significantly during his admission, and that he was well enough to be discharged either to detention (if UKBA maintained detention), or into the community. "It is no secret", she continued, "that the major reason for his improvement is that BA has not been in a detention environment". The two factors which would make the most difference to his prognosis were not being in detention and long-term psychological treatment.

B. the decisions concerning detention in this case

87. The structure of the decisions in this case is that a caseworker sets out the history, notes any changes since the last review, and then makes a proposal (or, after the format of the decisions changed, a recommendation). That is then endorsed by a more senior official, who is the decision maker. There is no legislative requirement for a minute recording the detention review. There is a legislative requirement that a detainee be given reasons for his detention, however. These reasons are set out in a form called an IS151F. In my account of the detention reviews I refer to these where appropriate. Each detention review decision is followed by a detention review

checklist. This is a tickbox form. It says "Caseowners should include this minute when submitting a detention review...". The boxes include risk assessment scores. None of these checklists has been completed in this case.

(a) 9 December 2010

88. B's detention under paragraph 2 was initially authorised in a decision dated 9 December 2010. The minute records that BA was twice transferred from prison to hospital for mental health treatment under "section 47/49 of the Mental Health Act 1983", the first time for about a year, and the second time from 1 June 2010 "to date". It records the intention of BA's treating clinician not to send him back to prison, "because he believes that [BA] will deteriorate very quickly in the prison environment". It goes on to say, "However, as [BA] is currently well, he is content for us to immigration detain [BA] on 12 December and transfer him to an immigration removal centre." Under "Other compassionate factors" the decision reads, "[BA] has been diagnosed with stress induced psychosis. He is currently being treated with Olanzapine. Treatment and medication for his illness are available in Nigeria. [BA's] responsible clinician has informed us that he is currently stable."
89. The caseworker noted that BA's asylum claim would have to be substantively considered as soon as he was transferred to immigration detention. A range of relevant factors was considered, including the seriousness of his offence, his lack of links to the United Kingdom, his desire not to return to Nigeria, and his failure to claim asylum until 2007 when he was served with notice of liability to deportation. The decision stated that "We are right at the beginning of the deportation process". His asylum claim needed to be resolved; his expired Nigerian passport could be used to obtain an ETD; this would take about a month. The presumption in favour of liberty was considered, but the balance of factors (in particular harm to the public and risk of absconding) came down in favour of detention when his sentence ended. Her proposal was that BA should be detained on completion of his sentence.
90. That decision was endorsed by an acting assistant director, who agreed that BA "should be detained at the end of his custodial sentence."

(b) 28 March 2011

91. BA's detention was next reviewed on 28 March 2011. The minute noted that BA's conditional release date had been scheduled for 11 December 2010, but that he was "detained beyond this date due to his mental condition". On 5 January 2011, the review went on, Wells Road Healthcare Centre had contacted CCD to say that they needed BA to be transferred as soon as possible to immigration detention as they could no longer accommodate him, as he had stabilised. The case was then transferred to DEPMU again to arrange his transfer to an IRC. On 12 January 2011, CCD provided Healthcare at Harmondsworth IRC with information about BA's diagnosis, medication, and whether he was currently eating or drinking. He was transferred from CCD's MDO on 3 February 2011 as his mental condition had stabilised.
92. Detention was authorised. BA had been convicted of a very serious offence. If he were released and re-offended in a similar way, he would pose a high risk of harm to the public. He had no connections in the United Kingdom, and no place to stay. As he had no access to the labour market, it was highly likely that he would turn to crime

to support himself, and might abscond. The timing of, and changing reasons for, his asylum claim, suggested that he had made the claim to delay removal. He was therefore at a high risk of absconding.

(c) 14 April 2011

93. On 14 April 2011, BA was refused temporary admission on the grounds that there was a risk of harm to the public, of re-offending and of absconding which outweighed the presumption in favour of release. UKBA wrote to Shan & Co, who were then BA's solicitors, replying to several letters from Shan & Co. The letter said that UKBA were satisfied that BA had access to any treatment he needed.

(d) 26 April 2011

94. The first hint of any current concern about BA's mental health is in an IS151F dated 21 April 2011. This refers briefly to medical disclosure forms. The detention review dated 26 April 2011 is more informative; it explains that the asylum interview scheduled for 8 April 2011 did not take place because BA appeared "disorientated and lethargic", said that his medication had run out three days ago, and that he had not been able to see medical staff at Harmondsworth IRC. That detention review adds that on 11 April 2011, a fax was sent to "Healthcare" at Harmondsworth IRC asking for an assessment of BA's mental health. That review also states, for the first time, against the date 1 February 2011, that "DEPMU recorded on CID's special conditions that: *"The subject is at risk of deterioration in his mental health and relapse of psychosis. He will refuse food and drink and becomes dehydrated. The risk is greater when he is under stress and off his medication (Olanzapine)"*.
95. The IS151F dated 18 July mentions that an assessment of BA's medication, and the regularity of his appointments with the psychiatric doctor was also requested on 11 April 2011. This led to requests for medical disclosure forms to be completed by BA. Completed forms were not received by Healthcare until 14 and 19 April 2011. However the detention review dated 18 July goes on to say that "Notwithstanding this, CCD P.o.r.t were advised of what is known of the subject's medical records from the Home Office file."
96. The action plan noted in the 26 April IS151F and detention review is that UKBA would "revert back" to Harmondsworth IRC for BA's medical records and confirm that he was fit to be interviewed about his asylum claim.
97. The decision was to maintain detention. According to the proposal, removal was likely within a reasonable time, but the asylum claim had to be resolved before an EDT could be procured. That could be done quickly. No judicial reviews had been lodged. The presumption of liberty was outweighed by the risk of serious harm which BA posed, "taking into account his mental health issues". His personal circumstances led to an unacceptable risk of re-offending and absconding. He was not suitable for release, even under contact management. That proposal was endorsed. Again, the "timing and changing reasons" of and for the asylum claim "may indicate" that the purpose of the claim was only to delay removal."

(e) 19 May 2011

98. On 27 April 2011 UKBA sent Harmondsworth IRC a fax, asking for information on BA. The IS151F dated 24 May 2011 describes the request thus. However, while the

IS151F dated 17 June 2011 also describes it thus, an entry several lines further down reveals that information requested was “a medical report for you”. The IS151F dated 18 July 2011 is more revealing. It states, “On 27 April 2011, a fax was sent to the Medical Doctor, Healthcare, Harmondsworth IRC, for urgent attention. This was for an assessment of the subject’s suitability for being interviewed regarding his asylum application, his current mental health, the medication he is taking and the regularity of his appointments with the psychiatric doctor.”

99. On 4 May 2011, Harmondsworth IRC sent UKBA a fax, attaching a letter dated 23 April 2011 from BA. He said that his medication was having side effects on him, which meant that he could not currently undertake his asylum interview. UKBA sent a chaser fax to Harmondsworth IRC, apparently asking for a medical report. This is mentioned for the first time in the IS151F dated 17 June 2011. It is not mentioned in the IS151F dated 24 May 2011.
100. The proposal was that detention be maintained. The presumption of liberty was outweighed by the risk of serious harm posed by BA “taking his mental health issues into account.” His circumstances gave rise to an unacceptable risk of re-offending and of absconding. He was not suitable for release, even under contact management. Detention was authorised by a Senior Executive Officer. She noted that the only outstanding barriers to removal were the asylum claim and the missing ETD. The presumption of liberty was outweighed by the risks.
101. The decision maker’s approach to BA’s illness is not clear. The proposal records that BA is “stated to have a mental illness”, and that medical information had been “commissioned”. The length of detention is said to have been balanced by “its benefits”, presumably the reduction in the risks of harm and absconding for so long as BA had been detained.
102. By 12 May, BA was on the waiting list to see a psychiatrist. He had been reported by a GP to be disoriented, lying on the floor, and to be repeating, “I see demons”.

(f) 17/21 June 2011

103. On 24 May 2011, a UKBA official went to Harmondsworth IRC Healthcare Unit and was told that BA had been there, at his own request, since 21 May 2011, as “he did not feel well”. This is mentioned for the first time in the IS151F dated 17 June 2011. It is not mentioned in the IS151F dated 24 May 2011. The detention review dated 17 June 2011 gives more information about events in May, stating that on 27 May the Healthcare Manager at Harmondsworth IRC had sent a fax to UKBA saying that BA was not attending an appointment for his fitness assessment, had been re-referred to mental health and until then was not fit for interview. Also on that date UKBA received an IS91RA Part C (saying that a food refusal log had been opened). Extracts from BA’s meals refused log were received on 2 June 2011.
104. On 3 June 2011, the healthcare manager at Harmondsworth IRC told the UKBA manager at Harmondsworth IRC that BA had been transferred to hospital on 2 June 2011 to be re-hydrated, and was stable.
105. The IS151F dated 17 June 2011 states that on 3 June 2011 “You had however continued to refuse food and fluids, or to speak to the Harmondsworth doctor.” This is

the first reference in any IS151F to the fact that BA had been refusing food and drink. It goes on to say that on 5 June 2011, Harmondsworth Healthcare's GP had seen BA that day and had asked him to go to hospital again to be re-hydrated; BA had eventually agreed to this. UKBA were told by Harmondsworth Healthcare on 4 June that a doctor's appointment had been booked for BA on 12 June 2011. UKBA asked for further information about BA's mental health in a fax dated 16 June 2011.

106. The detention review dated 17/21 June 2011 also mentions that on 4 June 2011, UKBA received notes from Harmondsworth IRC stating that BA was not fit for interview, had been seen by the duty psychiatrist, and had been referred to a mental health hospital for a possible admission under the 1983 Act. BA was awaiting assessment by Riverside Mental Health Care. The "action plan" suggested by that review was to interview BA about his asylum claim, "should he be fit to do so" and to consider reallocating the case to "CCD Mentally Disordered Team should the subject be sectioned under the [1983] Act."
107. The recommendation in this review for the first time alludes to paragraph 55.10 of the EIG (see further, below). It says that "The subject is stated to have a medical condition (mental health issues) and medical information was commissioned. But there are exceptional reasons to maintain detention, (not "very exceptional circumstances"), "(for example, the serious offence committed, continued treatment in the interests of the subject)". The alternatives were not "considered suitable at this time". The HEO who authorised detention said that it was unlikely that BA would comply with any reporting conditions. The risks were said to outweigh the presumption of liberty. The HEO did not refer to any considerations relevant to paragraph 55.10.

(g) 19 July 2011

108. The IS151F dated 18 July 2011 records that a letter before claim had been received, challenging BA's detention on medical grounds. The UKBA Deputy Manager at Harmondsworth IRC spoke to BA at length on 5 July 2011. BA agreed to go to hospital for re-hydration and feeding. BA was told on 6 July 2011 that he had been transferred to hospital. The IS151F then reports correspondence between BA's solicitors, Bhatt Murphy, and UKBA. It recorded that Bhatt Murphy had "claimed" that BA's refusal to eat and drink was a direct result of his mental illness and that mental health services should treat "your stated physical problems". It went on to say that "several requests have been made for a medical assessment by Harmondsworth Healthcare."
109. The detention review dated 18 July 2011 records that on 5 July 2011, BA was assessed by Healthcare at Harmondsworth IRC as being "unfit for detention". That information is missing from the IS151F of the same date.
110. The reasoning in the proposal is, word for word, identical with that of the June review. Yet there had been a marked deterioration in BA's condition between the two dates, as the review itself records. He had had to go to hospital for re-hydration and feeding. On 8 July he had been assessed by the healthcare unit at Harmondsworth IRC as not being fit for release into the community: he would need to go to hospital first. The mental healthcare unit had refused to accept BA in his current physical state. This review does not refer to the NOMS assessment of risk on 8 July 2011.

(h) high-level review on 29 July

111. On 29 July 2011, there was an exchange between two UKBA officials, Eleni Wood, and assistant director, and David Wood, the Strategic Director, CCD. She made a “referral for release”.
112. Mr Wood said that he needed to understand why the asylum claim had not been considered since 2007, as BA could not have been continuously unfit since then. He also asked whether BA’s unfitness for detention was related to his refusal of food “(ie self-imposed) or mental condition”. Ms Wood told him that the claim was not considered because, at first, the end of BA’s sentence was too far away, and after that, because he had been “sectioned”. He had been assessed as “medically unfit at this time because of his food and fluid refusal”, she went on, thus finessing the question, somewhat.
113. Mr Wood then refused to authorise release. BA was a “high risk subject who poses a risk to the public and who must also present as a reasonable risk of absconding”. His health problems were self-inflicted. “He should remain detained while we pursue deportation asap”. This prompted an email from Philip Schoenenburger, an assistant director, detention services. He expressed his surprise that BA had been not been released. He continued, chillingly, “...on our Monday conference call, we will discuss informing the RRT as there will be significant press interest if he does subsequently pass away. We have made sure that healthcare are keeping good and accurate details of his care and this record will be available to the PPO should he die.”

(i) high level review 1 August 2011

114. On 1 August Ms Hamilton again referred BA for release. She said that BA’s vital signs were stable over the weekend and he had drunk a small amount of water. Healthcare staff “will NOT at this point state that there is a risk for [BA]”. She asked whether the decision to detain still stood. Mr Wood replied that BA was “of medium risk” (Mr Wood had modulated his assessment from “high risk” on 29 July) and had committed a very serious offence. His medical condition was “directly related” to his refusal of food and drink. He expressed concern about BA’s condition, but said that release would considerably reduce UKBA’s ability to remove, and “present a high risk of absconding along with the risk of harm posed.” Detention should be maintained, but so should daily checks, and Mr Wood would consider release if “a critical stage is reached.”
115. He sent a further email that day, asking, “Can we be more pro-active with this case?”. He asked if a caseworker had visited BA “to try to fully understand his issues”, and said that “We need to do all we can to re-start the feeding and fluid intake and progress the case”.

(j) 16 August 2011

116. The recent NOMS assessment was referred to (paragraph 7). The caseworker noted that BA had been admitted to Colne Ward for a six-week assessment on 6 August 2011. BA was assessed as posing a high risk of absconding. BA was aware of UKBA’s intention to deport him, and did not have enough incentive to stay in contact with UKBA “on becoming well”. The recommendation said that BA had been convicted of a “very serious offence” involving drugs, which “causes serious harm to

the public". The presumption of liberty was displaced by the "high risk that the subject may abscond if released in the light of his previous conduct". Electronic monitoring did not mitigate risk. This is the first time electronic monitoring is expressly mentioned in the decisions. Detention was authorised by a Senior Executive Officer. She referred to BA's asylum claim, which could not be considered until BA was fit to be interviewed, and to his recent transfer to hospital. She said that the caseworker should contact the MDO to see if they had any interest in BA's case. She concluded that the presumption of liberty was outweighed by the risk of harm to the public, the risk of re-offending and the risk of absconding.

(k) 21 September 2011

117. The eighth review of detention was due in accordance with the terms of Chapter 55 of the EIG 12 September 2011. It in fact took place on 21 September, the same day as the CPA meeting at Colne Ward. The recommendation was made by a member of the MDO. She said that BA had been convicted of a very serious offence involving drugs, "this causes harm to the public". The presumption "towards" liberty was outweighed by the risk that BA might abscond in the light of his previous conduct. "It is not considered that Electronic Monitoring mitigates the risks". BA's release had been considered "in accordance with Chapter 55."
118. An HEO team leader authorised detention. She criticised the length of the review, and said that it needed to be condensed into a chronology. In her view, the fact that BA's asylum application was still outstanding was "mostly due to him refusing food and water resulting in him being so unwell that he would be unable to be interviewed. Unless [BA] is willing to comply, his asylum [claim] cannot be considered nor his case progressed". She mentioned the CPA meeting and said that "it was agreed that [BA] will be transferred back to an IRC in a few weeks."
119. In fact, BA was transferred to Harmondsworth IRC during the course of 7 October 2011. The Secretary of State did not give to BA's solicitors the 72 hours' notice of that transfer which were required by the order of HHJ Pearl QC of 26 July 2011.

C. The Legal Framework

(1) the relevant statutory powers

(a) under the Mental Health Act 1983 ("the 1983 Act")

120. Section 47 of the 1983 Act gives the interested party power to make a transfer direction in relation to prisoners. This authorises their detention under the 1983 Act. Section 47 provides, so far as is relevant:

"47.— Removal to hospital of persons serving sentences of imprisonment, etc.

(1) If in the case of a person serving a sentence of imprisonment the Secretary of State is satisfied, by reports from at least two registered medical practitioners -

(a) that the said person is suffering from mental disorder; and

(b) that the mental disorder from which that person is suffering is of a nature or degree which makes it

appropriate for him to be detained in a hospital for medical treatment; and

(c) that appropriate medical treatment is available for him;

the Secretary of State may, if he is of the opinion having regard to the public interest and all the circumstances that it is expedient so to do, by warrant direct that that person be removed to and detained in such hospital as may be specified in the direction; and a direction under this section shall be known as ‘a transfer direction’...

...

(3) A transfer direction with respect to any person shall have the same effect as a hospital order made in his case.”

121. Section 40 of the 1983 Act provides for the effect of a hospital order. It provides authority for the various people to convey the patient to the hospital specified in the order, and for the managers of the hospital to detain him in accordance with the provisions of the 1983 Act. Section 40(4) provides that a patient who is admitted to hospital under a hospital order shall be treated for the purposes of the provisions of the 1983 Act which are mentioned in Part 1 of Schedule 1 to the 1983 Act as if he had been so admitted on the date of the order in pursuance of an application for admission for treatment duly made under Part II of the 1983 Act, subject to any modifications of those provisions made in Part I of Schedule 1.
122. Section 20 of the 1983 Act provides that a patient may be detained in a hospital for up to six months beginning with the day of his admission, but shall not be kept for longer unless the authority for his detention is renewed under section 20. The effect of paragraph 6 of Schedule 1 to the 1983 Act is to substitute the “date of the relevant order or direction under Part III of this Act” for the date of the patient’s admission.
123. Section 48 of the 1983 Act provides:

“48.— Removal to hospital of other prisoners.

(1) If in the case of a person to whom this section applies the Secretary of State is satisfied by the same reports as are required for the purposes of section 47 above that

 - (a) that person is suffering from mental disorder of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment; and
 - (b) he is in urgent need of such treatment; and
 - (c) appropriate medical treatment is available for him.

the Secretary of State shall have the same power of giving a transfer direction in respect of him under that section as if he were serving a sentence of imprisonment.

(2) This section applies to the following persons, that is to say—

.....

(d) persons detained under the Immigration Act 1971 or under section 62 of the Nationality, Immigration and Asylum Act 2002 (detention by Secretary of State).

(3) Subsections (2) and (3) of section 47 above shall apply for the purposes of this section and of any transfer direction given by virtue of this section as they apply for the purposes of that section and of any transfer direction under that section.”

124. Mr Kellar referred in his oral argument to the decision of the Court of Appeal in *R v Birch* (1989) 11 Cr App R (S) 202. This explains that where a prisoner’s transfer under section 47 is accompanied by a restriction under section 49 (as in practice it usually is), the prisoner’s position is in many ways the same as it would have been if he had been sent to hospital with an order under sections 37 and 41, with some differences. The restriction automatically lifts when the custodial part of his sentence ends. A patient whose sentence has ended will remain in hospital until discharged by his responsible clinician. Such a patient is sometimes referred to as being subject to “a notional section 37”.

125. He submitted, and Mr Buley accepted, that, in this case, that BA’s responsible clinician was able to discharge BA from the detention under section 48. It is convenient for me to consider here whether I accept that, on the expiry of his sentence, BA was simply detained pursuant to section 48, or whether he was subject to “dual detention”; in other words, detention in hospital pursuant to section 48, and, at the same time, immigration detention under paragraph 2(1). In my judgment, BA must have been subject to dual detention. I say this because, on the view I take of paragraph 2(1) (see further, below), it requires detention from the end of a prisoner’s custodial term. This conclusion is also consistent with the Secretary of State’s first decision about detention, dated 9 December 2010, which is expressed to take effect from the end of BA’s custodial term. A “hospital” as defined in the 1983 Act is one of the places in which immigration detention may occur (see further below).

(b) under the Immigration Act 1971 (“the 1971 Act”)

126. It is a necessary inference from the facts that BA was detained under paragraph 2(1) of Schedule 3 to the 1971 Act. That inference is supported, if support for it is needed, by the covering letter which accompanied the deportation and detention decisions in this case which were served on BA on 10 December 2010.

127. Paragraph 2(1) of Schedule 3 to the 1971 Act provides that where (as here) a

recommendation for deportation made by a court is in force in respect of any person, and that person is not detained in pursuance of the sentence or order of any court, he shall, unless the court by which the recommendation is made otherwise directs, or a direction is given under sub-paragraph (1A), be detained pending the making of a deportation order in pursuance of the recommendation, unless the Secretary of State directs him to be released pending further consideration of his case or he is released on bail. Sub-paragraph (1A) is not relevant in this case, as BA's appeal against conviction did not succeed.

128. The rest of paragraph 2 provides:

“(2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.

(3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise).

(4) In relation to detention under sub-paragraph (2) or (3) above, paragraphs 17, 18 and 25A to 25E of Schedule 2 to this Act shall apply as they apply in relation to detention under paragraph 16 of that Schedule; and for that purpose the reference in paragraph 17(1) to a person liable to detention includes a reference to a person who would be liable to detention upon receipt of a notice which is ready to be given to him.

(4A) Paragraphs 22 to 25 of Schedule 2 to this Act apply in relation to a person detained under sub-paragraph (1), (2) or (3) as they apply in relation to a person detained under paragraph 16 of that Schedule.

(5) A person to whom this sub-paragraph applies shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by the Secretary of State.

(6) The persons to whom sub-paragraph (5) above applies are—

(a) a person liable to be detained under sub-paragraph (1) above, while by virtue of a direction of the Secretary of State he is not so detained; and

(b) a person liable to be detained under sub-paragraph (2) or (3) above, while he is not so detained.”

129. Paragraph 22 of Schedule 3 authorises the release on bail of a person liable to detention. Bail can only be granted by a chief immigration officer or by the FTT. Paragraphs 23-25 make consequential provisions about such bail.
130. The Immigration (Places of Detention) Direction 2011 provides that one of the places in which immigration detention may take place is a hospital as defined in the 1983 Act. This came into force in May 2011, but I am told that there were equivalent provisions in force before that, in particular during December 2010 and January 2011.
131. It is now convenient for me to explain my view about the construction of paragraph 2(1), which I foreshadowed earlier in this judgment. Paragraph 2(1) imposes a duty on the Secretary of State to detain, which is subject to a discretion to release in certain circumstances. The parenthesis to paragraph 2(3) has a similar structure. The discretions conferred by paragraph 2(1) and by the parenthesis are somewhat differently expressed, but neither side has submitted that this difference in language makes any difference, and I say no more about it.
132. I accept Mr Buley’s submission that it is necessarily implicit in paragraph 2(1) that the Secretary of State is under a public law duty periodically to consider whether or not to exercise the power to release, and that the exercise of that power is subject to public law. The question, which is also posed by the bracketed passage in paragraph 2(3), is whether where paragraph 2(1) applies, it provides the legal authority for detention, without more. Mr Kellar submits that it does. He accepts that the discretion to release must be exercised in accordance with public law principles. But, he argues, a breach of public law, while it may lead a court to quash a decision not to release, does not provide the foundation for a successful claim in tort, where detention is under paragraph 2(1).
133. Mr Buley submits that the duty to detain in paragraph 2(1) does no more than to provide for continuity of detention, in cases where it applies, so that, at the end of a custodial term of imprisonment, the prisoner continues to be detained without the Secretary of State instantly having to make a decision to that effect, but that it does no more than that. Once that transition has occurred, the effect of the duty is spent, and the lawfulness of further detention must be considered in the light of the Secretary of State’s decisions, under her policy, whether to detain or to release. A breach of public law will mean, not only that the decision is liable to be quashed, but that there is no lawful authority for continuing detention, so that the Secretary of State will also be liable for false imprisonment.
134. I have been referred by Mr Buley to two cases in which paragraph 2(1) has been considered: *R (Singh) v Secretary of State for the Home Department* [2011] EWHC 1402 (Admin) and *R (Vovk) v Secretary of State for the Home Department* [2006]

EWHC 3386 (Admin). Mr Kellar has referred me to the obiter passage in *WL (Congo)* which I mentioned above.

135. It appears from *Vovk* that the Secretary of State had in the past considered that paragraph 2(1) created what is referred to as a “presumption” of detention, but that the Secretary of State had retreated from that view by the time of the consent order in *R (Sedrati) v Secretary of State for the Home Department* [2001] EWHC 418 (Admin). That “presumption”, it seems, was that paragraph 2(1) was treated as a statutory mandate for detention “so that there was no need for any decision to be made” about release once a prisoner’s sentence was about to end (judgment, paragraph 12).
136. The consent order in *Sedrati* recorded the Secretary of State’s intention thenceforth to make a decision about detention or release on or before the end of the sentence (judgment, paragraph 13). The Secretary of State argued in *Vovk* that despite this, and despite its being a breach of his then current policy, a delay in making a decision about detention after the end of the custodial term did not render the intervening detention unlawful, because of the terms of paragraph 2(1). Calvert Smith J rejected this argument. Without what he called “the presumption”, the periods of detention in his case were unlawful.
137. The claimant in *Singh* was sentenced to imprisonment and recommended for deportation by a court in 2006. He appears to have been released after serving that sentence, to have re-offended, and to have been sentenced to imprisonment a second time. He was released from that sentence, and then detained under paragraph 2(1) (judgment, paragraphs 4-8).
138. At paragraph 12 of *Singh*, Collins J said that when paragraph 2(1) was enacted, the Human Rights Act 1998 (“the 1998 Act”) was not in force. Parliament had then intended, he held, that a recommendation for deportation would, itself, justify detention, without any further steps by the Secretary of State. That had changed as a result of the “importation into our law of article 5” of the ECHR. Collins J appeared to accept that paragraph 2(1) was a warrant for detention where both, a decision to detain had been made by the Secretary of State, and, there was, at least, a “preliminary intention to implement the recommendation” [sc for deportation (judgment, paragraphs 13-15). He referred, in this context to a “power”, not a “duty”, to detain (judgment, paragraph 15).
139. The thrust of these two decisions is that paragraph 2(1) does not (now), of and by itself, mandate detention at the end of a custodial term, except for a very short period, and where the Secretary of State has an intention to deport. They support Mr Buley’s submission. But I do not consider that this is the right approach.
140. My view is supported by two things. First, Collins J’s approach was that absent article 5 of the ECHR, paragraph 2(1) is intended, of and by itself, to authorise detention. With respect, I do not agree that article 5 undermines this view. First, detention for the purposes of removal is not precluded by article 5, provided that the detention is sufficiently closely connected with the purpose of removal and complies the other conditions stated in *Saadi v United Kingdom* (13229/03) (Grand Chamber) (2008) 47 EHRR 17). Second, if paragraph 2(1) requires detention in cases like these, and cannot be read down under section 3 of the 1998 Act, then, even if the statutory duty

to detain were incompatible with article 5, I would still have to give it effect.

141. My view is also supported by the obiter passage in *WL (Congo)* which I mentioned above. The passage is obiter because neither appellant had been detained under paragraph 2(1), but I consider that it is highly persuasive.
142. Giving the judgment of the Court, Stanley Burnton LJ said, at paragraph 88:
- “We consider, first, that it is necessary to distinguish between the detention of FNPs under sub-paragraph (1) of paragraph 2 of Schedule 3 to the 1971 Act and detention under sub-paragraphs (2) or (3) . Sub-paragraph (1) is itself legislative authority for the detention of a FNP who has been sentenced to imprisonment and who has been the subject of a recommendation for deportation. If an unlawful decision is made by the Secretary of State not to direct his release, the Court may quash the decision and require it to be retaken, but the legislative authority for his detention is unaffected. It follows that the FNP will have no claim for damages for false imprisonment in such circumstances.”

An “FNP” is a foreign national prisoner.

(2) the authorities on paragraph 2(2) and 2(3)

143. I must now consider the authorities on paragraphs 2(2) and (3), and their relevance, if any, to detention under paragraph 2(1).

(a) the *Hardial Singh* principles

144. In *Hardial Singh*, Woolf J ((as he then was) set out the principles governing the exercise of these powers. These were reconsidered by Dyson LJ ((as he then was) in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, [2002] INLR 196, at paragraph 46. In *Lumba* the majority of the Supreme Court accepted Dyson LJ’s restatement of these principles. His exposition (at paragraph 22 of the decision) was as follows:
- a. The Secretary of State must intend to deport the person and can only use that power to detain for that purpose.
 - b. The deportee can only be detained for a period that is reasonable in all the circumstances.
 - c. If before the expiry of a reasonable period, it becomes apparent that the Secretary of State will not be able to deport the detainee within a reasonable period, he should not seek to exercise the power of detention.
 - d. The Secretary of State should act with reasonable diligence and expedition to effect removal.
145. In *Lumba* Lord Dyson SCJ said, at paragraph 115, that the application of the *Hardial Singh* principles is a “fact-specific exercise”, which should not be done “rigidly or mechanically”. Various factors are relevant to the question whether the detention has been for a period which is reasonable in all the circumstances. These include (in this statutory context) whether, and if so, when, there is a prospect of a deportation order’s being made. They also include, in my judgment, whether, and if so, when, there is a prospect of deportation taking place. Detention should be for no more than a

reasonable period. Various factors are relevant to that assessment. These include the length of the period of detention, the nature of the obstacles which stand in the Secretary of State's path preventing the making of a deportation order, the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles, the conditions in which the detained person is being held, the effect of detention on him, the risk that if released he will commit further offences, and the risk of his absconding (see per Lord Dyson SCJ at paragraph 103 and 104 of *Lumba*).

146. These principles were formulated with an eye on detention under paragraph 2(2) and 2(3). I say this because those paragraphs confer discretions to detain, and deal with the sequence of events where there has been no recommendation for deportation by the court, and, first, notice of an intention to make a deportation order is served, and second, a deportation order is made by the Secretary of State. The principles focus on the Secretary of State's intention to deport, and on whether removal can be effected within a reasonable period. There was no recommendation for deportation by the court in *Hardial Singh*. There was such a recommendation in *I*, but a deportation order was signed just before the date when *I* was due to be released on licence from his sentence. *I* was detained under paragraph 2(3) of Schedule 3, and the argument in that case therefore concerned a period of detention after the deportation order had been signed, rather than the period of detention before that.
147. The decision in *Lumba* does not deal directly with paragraph 2(1). Lord Dyson SCJ recognises that different considerations may arise under paragraph 2(1) from those which arise in relation to paragraph 2(2) and 2(3); see paragraph 54 of the decision. He does not explore this further, however.
148. It is common ground that these principles, with modest modification to take account of the somewhat different context, apply to detention under paragraph 2(1). I have to decide, however, what the effect of a breach of these principles is in a paragraph 2(1) case. The alternatives are that a breach destroys the statutory mandate for detention, or that it is a breach of public law on which an application for judicial review could be based, requiring the Secretary of State to reconsider her decision, but leaving the statutory authority for detention intact. In the first case, a claimant would have a cause of action in tort, and in the second, he would not. The answer depends on whether the *Hardial Singh* principles are no more than relevant considerations, in a *Wednesbury* sense, or whether, as a matter of the construction of paragraph 2, they are essential elements of statutory detention.
149. I prefer the second view. The approach to provisions about detention is to construe them narrowly (see per Lord Dyson SCJ at paragraph 108 of *Lumba*). In my judgment, the principle that provisions affecting liberty should be strictly construed means that fulfilment of those principles is a condition precedent to detention under paragraph 2, even where, as in paragraph 2(1) and the parenthesis to paragraph 2(3), the statute requires a person to be detained.
150. For what it is worth, although the Secretary of State's policy cannot influence this question of construction, the current policy about detention is Chapter 55 of the EIG. This makes no distinct provision about detention under paragraph 2(1), which may be seen as a recognition that the same approach should be taken to the exercise of the discretion to release under paragraph 2(1) as should be taken to the exercise of the

powers to detain under paragraph 2(2) and (3). Further, Chapter 55 applies a general presumption of release to all cases.

151. As I have said, paragraph 2(1) can readily be read as imposing, by necessary implication, a duty on the Secretary of State to consider, with reasonable frequency, whether the power of release should be exercised. Such consideration can readily occur, in accordance with the Secretary of State's current policy, when detention is regularly reviewed. As I have also said, I also consider that the exercise of the discretion to release is governed by the *Hardial Singh* principles, modified as appropriate. The fact that those principles are being applied, not the exercise of a power to detain, but to the exercise of a power to release could make a difference, in theory at least. But in practice the Secretary of State's current policy does not make such a distinction, and I am concerned with the current policy, not a different policy which it might be open to the Secretary of State to promulgate.
152. Mr Buley relies on *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 for the approach which a court must adopt in applying the *Hardial Singh* principles. He submits, and I accept, that it is for the court to decide whether detention complies with those principles. The court does not apply a *Wednesbury* test to the Secretary of State's view on such questions: see *A* at paragraphs 62, 67 and 75.
153. A further issue I have to decide arises from the terms of the proposals to detain dated 18 July and 17 June 2011. This is whether if one of the purposes of continuing to detain a person is "continued treatment in the interests of the subject" that renders the decision to detain unlawful, as such a purpose is an improper purpose. Cranston J held that the prevention of suicide was an improper purpose in *AA (Nigeria)*, paragraph 40. In *OM (Nigeria)*, at paragraph 32, Richards LJ was prepared to assume the correctness of that proposition. I assume, also, that that proposition is correct, certainly in a case, like this, where, on the balance of probabilities, the need for treatment arises because the detainee has become ill as a result of being detained.

(b) what is the effect of a breach of the Secretary of State's policies in relation to the exercise of powers under paragraph 2 of Schedule 3?

154. In *Lumba* the Supreme Court decided, among other things, that a breach of public law which "bears on and is relevant to the decision to detain" will make that detention unlawful (per Lord Dyson SCJ) at paragraph 68 of the decision. A failure to follow a published policy may, depending on the circumstances, be a breach of public law. If that failure "bears on and is relevant to" the decision to detain, it will make the detention unlawful. An example of such a failure would be a failure to follow a published policy about the frequency of detention reviews. An example, by contrast, of a failure to follow a policy which would not make the detention unlawful would be where an official of the wrong grade makes the decision to detain (see per Lord Dyson SCJ at paragraph 68 of the decision).
155. In *Kambadzi* the Supreme Court applied this approach to a breach by the Secretary of State of the policy which provides for regular reviews of detention (see paragraph 42 of that decision, per Lord Hope SCJ).
156. The Supreme Court rejected what Lord Dyson SCJ described as "the causation argument". This is an argument that, in a case where the Secretary of State has acted

unlawfully in detaining a person (for example, by doing so pursuant to an unlawful policy, or in breach of her policy), but that person would have been detained had a lawful policy been applied to his case, that detention is lawful (decision, paragraphs 56-88). But if the person would have been detained anyway, had the Secretary of State acted lawfully, he may be entitled to no more than nominal damages (decision, paragraph 71).

157. Neither the decision in *Lumba*, nor that in *Kambadzi*, was concerned with detention under paragraph 2(1). In my judgment, where the warrant for detention is not the exercise of a statutory power, but derives from the statute itself, it is difficult to see how a failure to follow a policy can undermine the statutory warrant for detention. There is such a warrant unless and until the Secretary of State takes a lawful decision to release a detainee. But, if I am right about the effect of the *Hardial Singh* principles, and if the court decides that detention breaches them, that will destroy the statutory warrant for detention, and will found a cause of action in tort.

(c) damages for unlawful detention

158. The next issue is what approach the court should apply in deciding whether a claimant is entitled to more than nominal damages. Mr Buley submitted in his skeleton argument that BA would be entitled to more than nominal damages for any period of unlawful detention, unless his detention would have been “inevitable” had the Secretary of State acted lawfully. That submission was made on behalf of the claimant in another case, and rejected.

159. That case is *OM v Secretary of State for the Home Department* [2011] EWCA Civ 909. Richards LJ, with whom Ward and Hughes LLJ agreed, held (judgment, paragraph 23), that normal compensatory principles applied, citing Lord Hope, at paragraph 56 of *Kambadzi*. It is for the claimant to prove his loss on the balance of probabilities. “It may well be that in circumstances such as these the burden may sometimes shift to the defendant to prove that the claimant would and could have been detained if the power had been exercised lawfully; but again, I see no reason why the standard of proof should be anything other than the balance of probabilities”

160. “The question whether the claimant *could* lawfully have been detained is a matter of legal assessment in relation to which the burden and standard of proof are of no materiality. The assessment has two separate strands to it. The first, concerning the policy itself, depends on normal *Wednesbury* principles: would it have been open to a reasonable decision-maker, directing himself in relation to the policy, to detain the appellant in the circumstances of the case? The second requires the lawfulness of detention to be assessed by reference to the *Hardial Singh* principles.” (judgment, paragraph 24). A similar approach to this issue was adopted at first instance in *R (Sino) v Secretary of State for the Home Department* [2011] EWHC 2249 (Admin), at paragraphs 76-92 and 218-230.

(3) the relevant parts of the EIG

161. I reject Mr Kellar’s submission that it is for the Secretary of State, and not for the court, to construe the Secretary of State’s published policy (see *Anam v Secretary of State for the Home Department* [2009] EWHC 2496 (Admin), per Cranston J at paragraphs 49 and 50). I accept his submission that the policy must be read as a whole. There are two issues about the proper construction of the EIG. The first is its

approach to the weight to be given to the risks of re-offending and of harm to the public in the case of a person who has committed a “serious offence”. The second is the meaning of paragraph 55.10, which deals with the detention of people who suffer from serious mental illness.

162. Chapter 55 of the EIG deals with detention and temporary release. It applies to all the people who are potentially liable to be detained under immigration powers. These include children, families, pregnant women, those who have not committed any crimes, and those who have committed less serious crimes, and those whose crimes are serious enough to make them liable to deportation. Those who are liable to be deported, in turn, will include people who have committed one acquisitive crime (provided that the sentence is more than 12 months’ imprisonment), a person who has been sentenced to imprisonment of any length for a drugs offence other than “minor possession”, and those who have committed more than one very serious offence (for example robberies, or serious offences of violence). The risk which such offenders will pose to the public is likely to vary.
163. Chapter 55 begins by stating that there is a presumption in favour of temporary admission or release (see also paragraph 55.3.1). “Each case must be considered on its individual merits” (paragraph 55.3.3). Paragraph 55.1.3 states that detention must be used sparingly, and for the shortest period necessary. “It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process once any appeal rights have been exhausted. A person who has an appeal pending or the representations outstanding may have more incentive to comply with any restrictions imposed, if released, than one who is removeable”.
164. The current policy has two relevant aspects, which must be read in tandem. The first is the approach taken to the detention of people who have been convicted of “a more serious offence”. The second is the approach which should be taken to people who suffer from mental illness. A third aspect is also relevant. This is the section which deals with detention reviews.

(a) Criminal Casework Directorate (“CCD”) cases

165. There is much text on this subject. It is repetitive and confusing, and would be improved by editing. This section of this judgment, in consequence, suffers from those flaws also.
166. Paragraph 55.1.2 states that foreign national prisoners (“FNPs”), that is, those who are liable to deportation, are subject to the presumption in favour of temporary admission or release, “unless the circumstances of the case requiredetention”. Special attention must be paid to the “individual circumstances”. In any case where the deportation criteria are met, the presumption of release should be weighed against the risk of re-offending and the “particular” risk of absconding. The need to protect the public will mean that if a person’s criminal record is serious enough to meet the “deportation criteria”, and/or “because of the likely consequence of such a criminal record for the assessment of the risk that such a person will abscond”, the conclusion which is likely to result is that the person should be detained, “provided that detention is, and continues to be, lawful”. That conclusion will only result if the presumption of liberty is displaced by the risk of re-offending or of absconding. The deportation

criteria for non-EEA nationals are a single sentence of 12 months' imprisonment, or a custodial sentence of any length for a "serious drugs offence" (this means, any drugs offence apart from "minor possession").

167. Paragraph 55.1.3 also deals specifically with CCD cases, that is cases involving FNPs. In such cases, "if detention is indicated, because of the higher likelihood of risk of absconding and harm to the public on release, it will normally be appropriate to detain as long as there is still a realistic prospect of removal within a reasonable timescale." Caseworkers should look at paragraphs 55.1.4, 55.3.1, 55.9 and 55.10 in deciding whether further detention might be unlawful.
168. "Substantial weight should be given to the risk of further re-offending or harm to the public indicated by the subject's criminality. Both the likelihood of ...re-offending, and the seriousness of the harm if the person does re-offend, must be considered." Where the offence is [any drugs offence other than an offence of minor possession], "the weight which should be given to the risk of further offending or harm to the public is **particularly substantial** when balanced against other factors in favour of release. In cases involving these serious offences, therefore, a decision to release is likely to be the proper conclusion only when the factors in favour of release are particularly compelling. In practice, release is likely to be appropriate only in exceptional cases because of the seriousness of violent, sexual, drug-related and similar offences."
169. The passage I have set out in the previous paragraph contains two non sequiturs in my judgment. It starts with an unobjectionable injunction to caseworkers to assess the risks of re-offending and harm to the public posed by an individual, and to give substantial weight to such risks (where they are identified). It then asserts that where the offence is any of the offences listed on page 60 of Chapter 55, the weight to be given to those risks is "particularly substantial". Finally, it counsels that where such offences have been committed, "particularly compelling factors" will be needed to justify release, and that release in such cases will in practice be appropriate only in exceptional cases. The assertion and counsel do not follow from the premise. They seem to be based on an assumption that everyone who has committed a listed offence ipso facto poses a risk of re-offending and of harm to the public. Common sense suggests that that is not so, and that the premise is correct in suggesting that the assessment of such risks must be done for each individual. In my judgment, the decisions to detain and to maintain detention in this case have been significantly influenced by the generalisations in this passage.
170. Paragraph 55.3.A is entitled, "Decision to detain - CCD cases". The first part of paragraph 55.3.A adopts a more individualised approach to the assessment of risk in FNP cases. This paragraph refers to "all relevant factors" which must be weighed against "the particular risks of re-offending and of absconding which the individual poses". It says that the presumption in favour of temporary admission "may well be outweighed by the risk to the public for harm from re-offending or the risk of absconding, evidenced by a past history of lack of respect for the law". But the second part of that paragraph, headed "More serious offences", states that a conviction for one of the more serious offences "is strongly indicative of the greatest risk of harm to the public and a high risk of absconding". That risk of harm carries "**particularly substantial weight**....in practice, it is likely that a conclusion that such

a person should be released would only be reached where there are exceptional circumstances which clearly outweigh the risk of public harm and which mean that detention is not appropriate.” Caseworkers must balance against the increased risk...factors considered in non-FNPcases, for example, if the detainee is mentally ill....a reasonable period may last longer than in non-criminal cases, particularly given the need to protect the public”. The paragraph concludes by saying that where the criminal offence is less serious, risks of harm to the public through re-offending and absconding are to be given less weight when balanced with other relevant factors, such as mental illness.

171. Paragraph 55.3.2.1 states that particularly substantial weight should be given to the public protection criterion in cases involving “...drug-related and other serious offences”.
172. Further guidance on CCD cases is given in paragraph 55.3.2. Substantial weight should be given to the risk of further offending and the risk of harm to the public. It states that “caseworkers must carefully consider all relevant factors in each individual case to ensure that there is a realistic prospect of removal within a reasonable period of time”. It repeats some of the material I have set out above.
173. Whether removal is imminent is a relevant factor. It is a relevant factor here, but because removal was not imminent, rather than because it was. Removal was not “imminent” under this policy, for a number of reasons. BA had no valid travel document, no removal directions had been set, there is a legal barrier to removal (BA’s extant asylum claim, and now, his outstanding appeal). In my judgment, removal was not at any stage likely to take place within 4 weeks.
174. Caseworkers assessing the risk of absconding should consider previous failures to comply with temporary release or bail, and an individual’s immigration history. There is no relevant history here. Conviction of a serious offence, however, “may indicate a high risk of absconding”.
175. Paragraph 55.3.2.6 states that “Risk of harm to the public will be assessed by NOMS unless there is no Offender Assessment System (OASYS) or pre-sentence report available”. This sentence is difficult to understand, and I wonder whether “an” should be substituted for “no”. Caseworkers are advised to telephone the offender manager for an up-date. A risk of harm on release, or of a likelihood of re-offending assessed by NOMS as “high or very high” should “be treated as an assessment of “a high risk of harm to the public”. There is a table at paragraph 55.3.2.10 for converting NOMS assessments into an overall risk of harm for caseworkers. In BA’s case, his overall risk assessment would be medium as at July 2011, and low as at the first NOMS assessment.
176. Paragraph 55.3.2.1 says that those assessed as low or medium risk should generally be considered for “rigorous contact management”. Particular factors may show that this is not appropriate. In cases involving serious offences, “a decision to release is likely to be the proper conclusion only when the factors in favour of release are particularly compelling. In practice release is likely to be appropriate only in exceptional cases because of the seriousness of violent, sexual, drug-related and similar offences”. The premise of this passage is similar to the assumption I mention in paragraph 169,

above. The policy appears to promise decisions based on an assessment of individual risk, but then withdraws that promise in the case of FNPs who have committed “serious” offences. But, in my judgment, that approach is inconsistent with other passages in the policy which indicate that the assessment, and resulting balance, of relevant factors, must be done in an individualised way.

(b) mental illness and the assessment of risk

177. Mental illness is mentioned as a relevant factor twice in paragraph 55.3.A, and in paragraph 55.3.1.

178. Paragraph 55.10 of the EIG deals in more detail with the detention of (among others) people who are suffering from mental illness. It is headed “Persons Unsuitable for Detention”. It provides:

“55.10 Persons considered unsuitable for detention

Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or in prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.

In CCD cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm is such that it outweighs factors that would otherwise normally indicate that a person is unsuitable for detention.

The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or elsewhere:

those suffering from serious mental illnesses which cannot be satisfactorily managed within detention (in CCD cases, please contact the specialist Mentally Disordered Offender Team). In exceptional cases, it may be necessary for detention at a removal centre or prison to continue while individuals are waiting to be assessed, or are awaiting transfer under the Mental Health Act”.

179. Paragraph 55.10 of the EIG was considered by Cranston J in *R (Anam) v Secretary of State for the Home Department* [2009] EWHC 2496 (Admin). The version of the policy which he considered did not contain the words “which cannot be satisfactorily managed in detention”, or the last sentence. His approach to the earlier version was endorsed by Court of Appeal ([2010] EWCA Civ 1140). *Anam* was decided before *Lumba*.

180. The appellant in that case was a persistent violent offender. He had committed some 40 offences, and had been convicted 26 times since 1991. These escalated in seriousness, culminating in a robbery for which he was sentenced to 4 years’

imprisonment. He had a many convictions for Bail Act offences. He had used about 20 aliases. He had been detained for just over 15 months. He had frustrated legitimate attempts to remove him.

181. At paragraphs 51-55 of his judgment Cranston J made the following points:
- a. Effect must be given to the words “very exceptional”. Considered in isolation, those words suggest that the power to detain the mentally ill should be used infrequently, and in cases which were in nature different from those in which the power is frequently used.
 - b. There must be available objective evidence establishing that a detainee is suffering from mental illness which is serious enough to entail consideration of whether his circumstances are sufficiently exceptional to warrant detention. The nature and severity of the illness, and the likely effect on it of continued detention must be considered.
 - c. Weight must be given to other aspects of paragraph 55, such as the risk of re-offending, and the seriousness of harm to the public if the detainee were to re-offend.
 - d. Absconding is also a consideration.
 - e. While a “strong presumption in favour of release” will operate in as a result of a person’s mental illness, there are other factors which go into the balance. The policy applies to a range of detainees, not just to foreign national prisoners. There is a spectrum of cases involving mental illness, with an asylum seeker at one end, and a high risk terrorist detained on grounds of national security. Risks of re-offending and absconding are also to be factored in. “When the person has been convicted of a serious offence substantial weight must be given to those factors. In effect, paragraph 55.10 demands that, with mental illness, the balance of those factors has to be substantial indeed for detention to be justified”. At paragraph 68, he said that there must be “an elevated risk of absconding and re-offending to counter the strong presumption in favour of release.”
182. There are two other issues of construction about paragraph 55.10. First, it is not clear whether, when this passage refers to “the risk of offending or harm to the public” it means individual risk as assessed by NOMS, or the risk which, in many of the passages I have quoted above, it appears, is assumed to be posed by offenders who have committed “serious” offences. In my judgment, since what is being balanced are the factors in favour, and against, the detention of a person who may be unsuitable for detention, the policy must mean that the assessment of risk is to be done on an individual basis, and not by reference to what Mr Kellar referred to as, in effect, “an instruction” to detain those who have committed serious offences. I consider that this approach is also supported by *Anam*.
183. The other issue of construction is what is meant by the phrase, “those suffering from serious mental illnesses which cannot be satisfactorily managed in detention”. The issue concerns the stage at which this part of the policy is engaged. Mr Kellar’s submission is that the policy is only engaged if the detainee is currently, and obviously, suffering from a condition which cannot be managed in detention. This part of the policy was not engaged in the initial stages of BA’s detention, because when he was discharged from hospital, he was stable, and, indeed, euthymic. Mr Buley submits that this part of the policy is engaged when the Secretary of State is

deciding whether or not to detain a person who is suffering from a mental illness which may mean that his illness cannot be managed satisfactorily in detention, even if he is well at the time his case is considered. Here, on the information available to UKBA, there was a clear risk that BA, though initially stable, could quite quickly deteriorate, and as a result of detention, to a point where his illness would not be manageable in detention.

184. I prefer Mr Buley's submission. It seems to me that Mr Kellar's interpretation of the policy is likely to lead to the very problems which occurred here. The laissez faire approach entailed in this construction would permit the Secretary of State to detain someone who is potentially unsuitable for detention, and to forget about him, leading to risks that the detainee's condition will not be monitored, and of deterioration to a point where the illness cannot be managed. Mr Buley's construction, on the other hand, is likely to lead to a more conscious approach to the identification, and care and custody, of those with serious mental illnesses, because it requires the Secretary of State to confront this issue at the outset, to make plans for the detainee's welfare if the decision is to detain, and to be alert, in detention reviews, for signs of deterioration which may tilt the balance of factors against detention.
185. I consider that this approach is supported by *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin). In that case, David Elvin QC sitting as a Deputy High Court Judge considered the lawfulness of the detention of S. I should note that only two of the detention reviews he considered in his judgment took place under the recent version of paragraph 55 which applies in this case. There was a significant amount of evidence that S suffered from mental illness, but scant recognition of this in the detention decisions which were made in his case. The Deputy Judge said (judgment, paragraph 171) that first, the decision maker should consider the nature and severity of any mental illness, and the impact of continuing detention on it, in the light of objective, expert medical evidence. If these matters are not considered, "then the decision maker cannot properly determine whether there are circumstances which outweigh the impact of detention."
186. He went on to say that the other relevant factors should then be balanced, and that it by no means followed that a detainee's mental illness would prevent detention. "There may, for example, be cases which are not significantly affected by the illness, or which are susceptible to treatment in detention. There may also be cases of such significant risk to the public which outweigh even significant problems which would be caused by detention." The Deputy Judge went on to decide that a breach of this aspect of the EIG would, in the light of the decision in *Lumba*, make a detainee's detention unlawful. I agree with that approach (subject to what I have said about the effect of paragraph 2(1)). The type of breaches he considered are set out at paragraph 174 of his judgment. He held that those breaches were made out, and that the detention was unlawful. The policy had not been properly understood or applied by those who made decisions about S's detention (judgment, paragraph 182).
187. The Deputy Judge also pointed out that S's condition was specifically aggravated by detention (paragraph 179); he held that that was a critical consideration.
188. Paragraph 55.8A refers to rule 35 of the Detention Centre Rules. This rule imposes an obligation on "healthcare staff at removal centres" in relation to "any detained

person whose health is likely to be injuriously affected by continued detention or any conditions of detention". Healthcare staff must report such cases to the centre manager. These reports are then passed to those who make decisions about detention. This is so that "particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention. The information ...in the report needs to be considered when deciding whether continued detention is appropriate in each case".

(c) detention reviews

189. Paragraph 55.8 provides that initial detention must be authorised by a CIO/HEO or Inspector/SEO. In all cases where people are detained solely under the Immigration Act powers, continued detention must "as a minimum" be reviewed at specified points. "Additional reviews may also be necessary on an ad hoc basis, eg where there is a change in circumstances relevant to the reasons for detention". There is no requirement to review detention in the first 28 days in CCD cases "where detainees come from prison and their personal circumstances have already been taken into account by UKBA when the original decision to detention was made." Detention reviews are necessary "in all cases to ensure that detention remains lawful and in line with stated detention policy at all times". The table for CCD case indicates that detention should be reviewed after each month in detention. In this context, a month is said to mean 28 days. The rank of the official who is supposed to review detention varies from month to month.

(4) detention of a person suffering from serious illness and the ECHR

190. In *S* the Deputy Judge also upheld the claimant's argument that his continued detention was a breach of his article 3 and article 8 rights. Mr Buley invites me to uphold a similar argument in this case. Mr Buley and Mr Kellar agree that the relevant principles appear at paragraphs 187 to 208 of the judgment in *S*. I do not repeat them at any length here. Instead, I summarise the principles by reference to the citations in that section of the judgment in *S*.
191. The right not to be subjected to torture or to inhuman or degrading treatment is an absolute right. It has both a positive and a negative aspect; the state must both take steps to ensure that individuals are not subjected to treatment breaching article 3, and must not itself inflict such treatment. To engage article 3, ill treatment must engage a minimum level of severity. Whether that level is reached is to be judged in the light of all the circumstances of the case.
192. The treatment must involve actually bodily injury or intense physical or mental suffering. Treatment which "humiliates or debases an individual showing a lack of respect for, or diminishing, his ...human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral or physical resistance, it may be characterised as degrading..." The suffering which flows from illness may be covered by article 3 "where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible." It is possible for treatment which is not severe enough to breach article 3 to be a breach of article 8, where there are "sufficiently adverse effects on moral and physical integrity.....The preservation of mental stability is an indispensable precondition to effective enjoyment of the right to respect for private life."

193. Article 3 does not create an obligation to release a detainee on health grounds, or to transfer him to hospital to obtain treatment. But the State must ensure that a person is detained in conditions which are compatible with his human dignity “and do not “subject him to a degree of distress and hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.” There may be a breach of article 3 even if the authorities do not intend to humiliate or to debase a person, though the purpose of any treatment to which the detainee is subjected is a relevant factor.
194. The fact that a person is suffering from mental illness has been detained is relevant to the assessment, since the State has an obligation to safeguard the health of those it detains. A lack of appropriate medical treatment may in such circumstances be a breach of article 3. That such people are vulnerable and may not be able to complain either coherently, or at all, about their treatment, is also relevant to that assessment. Even if it is not possible to say with any certainty whether a person’s symptoms have been caused by his detention, or not, proof of a causal link between suffering and detention in the case of a person who is suffering from a mental illness is not a necessary pre-condition of a finding that article 3 has been breached.
195. Inadequate record keeping, insufficient recourse to expert psychiatric help, and failures to monitor a detainee properly may be relevant to the assessment also.
196. The Deputy Judge also referred to cases about article 2. These describe the vulnerability of detained patients. They show that article 2 imposes a duty on the State to take appropriate systemic precautions to prevent suicides by detained patients, with a level of supervision tailored to the risk that a particular patient would, in his current condition, commit suicide. The authorities should do all they can reasonably do to guard against such risks. It is not appropriate to “wait and see”. If there are grounds for thinking that harm might be suffered which exceeded article 3, an informed decision should be taken to avoid that risk.

D. Discussion

197. There are 3 issues: whether
- a. BA’s detention, or any period or periods of detention, were unlawful; if so
 - b. BA is entitled to more than nominal damages in respect of that period or those periods;
 - c. BA’s detention breached his rights under the ECHR.
198. I will consider each of the Secretary of State’s decisions concerning detention, and decide each of the first three questions in relation to it, even if, on my approach, that question does not arise. I will then consider whether BA’s detention has entailed a breach of his rights under article 3.

(A) the lawfulness of detention

(1) the first decision

(i) was there a breach of the policy?

199. The proposal and decision of 9 December 2010, whatever else they did, or did not, do, in terms only authorised detention from 11 December 2010. They must be taken to have authorised immigration detention in a hospital setting (see the direction concerning places of detention, and see paragraph 125, above).
200. The material which was known, or should have been known, to the decision maker (because it had all been communicated to UKBA) raised, in clear terms, the fact that BA had been diagnosed with a serious mental illness. Indeed, he was, at the time of that decision, still in hospital. Further, that material also showed that there was a significant history of his illness being made worse by detention, and that, when ill, he had refused food and drink.
201. This meant that paragraph 55.10 of the EIG was a relevant consideration for the decision maker, at each stage when a decision was made about BA's detention or release. Even though BA was stable in December 2010, the balance of the evidence indicated that he had a serious mental illness. The evidence also indicated, that there was, at the very least, an issue about whether, when BA's condition deteriorated, his illness was capable of being managed satisfactorily in detention (if detention were to last for any length of time). BA's responsible clinician's view that BA would deteriorate "very quickly in a prison environment" is reported.
202. I remind myself that the circumstances included the fact that BA's removal was not imminent. At that stage, he had an outstanding asylum claim. He had not been interviewed in connection with that claim. There was no certainty when he would be fit for interview. He had no travel document. Thus, it was not likely that detention would be for a short period; rather, it was likely to last some months. Finally, although he had been served with a notice of an intention to make a deportation order, no deportation order had yet been made. The detention decision notes "We are right at the beginning of the deportation process". It suggests that an ETD would take a month to obtain, but gives no estimate of the likely proposed length of detention.
203. The proposal refers to BA's previous transfers from prison to hospital in bland terms. It notes his current doctor's view that BA "would deteriorate very quickly in the prison environment". BA's illness is referred to as a "compassionate factor". It is said that he has been diagnosed with stress-induced psychosis. The decision refers to his prescribed treatment, continues (irrelevantly for current purposes) that treatment is available in Nigeria, and concludes that he is "currently stable". This description does not suggest that the decision maker considered that BA was not suffering from a mental illness, but rather, that he was then stable.
204. The proposal states that the presumption of liberty is "outweighed on balance" by the risk of harm to the public and the risk of absconding. The risk of harm to the public, and of absconding, is an assumption based on the nature of BA's offence. It is not based on any assessment by NOMS of the risk posed by BA. A risk of absconding is assumed. NOMS had assessed BA's risk of re-conviction and of harm to the public as "low" on 20 October 2008. On 19 November 2010, BA's risk of absconding was assessed by the healthcare trust as low, although on 24 November 2010 it was suggested in the course of a meeting that this might change once the Secretary of State made a decision in his case. In any event, I remind myself that, as Dyson LJ (as he then was) observed in *I* at paragraph 53, the risk of absconding cannot be treated as

a trump card in every case.

205. In all the circumstances, this decision was made in breach of paragraph 55.10. It did not get to grips with the issues which arise under paragraph 55.10 of the EIG. The references to BA's illness, and to his transfers from prison to hospital, are insufficient for this purpose. Nor does the fact that BA was then stable mean that paragraph 55.10 did not apply. There is no reference to the test in paragraph 55.10, or how it is said to be met on the facts. There is no consideration of whether, given the likely period for which it might be necessary to detain BA, any likely deterioration in his condition could be managed satisfactorily. Finally, the decision maker has not referred to, or explained why she has departed from, the assessments of risk made by NOMS in 2008. I note in passing that in *S* the detention decisions, which also affected a detainee at Harmondsworth IRC, did in terms advert to the exceptionality test in paragraph 55.10.

(ii) was BA falsely imprisoned?

206. But the statutory warrant for detention was not undermined unless detention at this stage was also a breach of the *Hardial Singh* principles. I do not consider that, at this early stage, there was such a breach. At this stage it was possible, although not certain, that removal could take place within a reasonable period.

(iii) would BA have been entitled to damages?

207. I would also hold, if the issue arose, that the Secretary of State could lawfully have detained BA at this stage, and would have done so, if she had followed her own policy. BA was then stable, and there was no reason to think his illness, as it then stood, could not, at that stage, be managed in detention.

(2) the period between 8 January 2011 and 28 March 2011

(i) was there a breach of the policy?

208. Under the terms of the policy, BA's detention should have been reviewed, at the latest, within 28 days of the first decision and at 28-day intervals after that; but it was not. I do not consider that while BA remained in hospital it was necessary to review detention more frequently than every 28 days. The failures to review detention were a breach of Chapter 55, and could have been challenged in this Court.

(ii) was BA falsely imprisoned?

209. Those failures did not undermine the statutory warrant for BA's detention, as, in my judgment, the *Hardial Singh* principles were not infringed. BA had not been detained for an unreasonably long period, and it was still possible that removal would take place within a reasonable time.

(iii) would BA have been entitled to damages?

210. I would also hold, if the issue arose, that the Secretary of State could lawfully have detained BA at this stage, and would have done so, if she had followed her own policy. BA was still stable, and there was no reason to think his illness, as matters stood, could not, at that stage, be managed in detention.

(3) the decision of 28 March 2011

(i) was there a breach of the policy?

211. The proposal reported that removal was likely within a reasonable time; "Once the

subject's asylum claim has been resolved, a travel document application can be progressed, which should be decided within a short time." The proposal was to maintain detention, on the grounds that BA had been convicted of "a serious drugs offence which causes harm to the public". The presumption of liberty was outweighed by the risk of harm posed by BA. There was also an unacceptable risk, in the light of his personal circumstances, that he would abscond. That proposal was endorsed. BA had been convicted of a "very serious drugs offence." Should he be released and re-offend in a similar manner, he will pose a high risk of harm to the public. It was considered that because he had no connections and nowhere to stay, he would turn to crime to support himself, and might abscond. "He has now claimed asylum, but the timing and the changing reasons indicate that he is only doing so to delay removal". The general presumption of liberty is said to be outweighed by the risk of re-offending and absconding. In common with the other detention reviews, no detention review checklist appears to have been completed.

212. The reasoning in this decision does not refer to BA's mental illness at all. It has the same flaws as the initial decision. It does not comply with paragraph 55.10 of the policy. In addition, the decision maker appears to think, incorrectly, that BA's asylum claim had only been made recently; whereas it had first been indicated in 2007, and presented in a detailed form while he was still in hospital.

(ii) was BA falsely imprisoned?

213. However, the statutory warrant for detention is not undermined, because detention still complied, in my judgment, with the *Hardial Singh* principles. At this stage BA had been detained for 56 days in Harmondsworth IRC. That is not, in the circumstances, an unreasonably long period. It was still possible, although not certain, that removal could take place within a reasonable period.

(iii) would BA have been entitled to damages?

214. I would also hold, if the issue arose, that the Secretary of State could lawfully have continued to detain BA at this stage, and would have done so, if she had followed her own policy. BA was still stable, and there was no reason to think his illness could not, at that stage, be managed in detention

(4) the decision of 26 April 2011

(i) was there a breach of the policy?

215. This decision for the first time mentioned (against the date 11 February 2011) a record on BA's Special Conditions which stated that BA was "at risk of deterioration in his mental health and relapse of psychosis. He will refuse food and drink and becomes de-hydrated. The risk becomes greater when he is under stress and off his medication (Olanzapine)". This decision also reports the circumstances of the failed attempt to interview BA about his asylum claim, his further claims not to have received his medication for 3 days, and to have been unable to see the healthcare team, and by a request by UKBA on 11 April for information about BA's mental illness and an assessment of his mental health from the healthcare unit.
216. Although there was by this stage evidence that BA was becoming ill again, "None known" was entered under the heading, "Changes in circumstances....". Removal was said to be likely within a reasonable time. The asylum claim had to be resolved before an ETD could be obtained. "No judicial review challenges have been lodged".

217. The proposal was to maintain detention. The presumption in favour of release was said to be outweighed by “the risk of serious harm the subject poses (taking his mental health issues into account)”. There were unacceptable risks of re-offending and of absconding, given BA’s personal circumstances.
218. This decision was flawed, for the same reasons as the earlier decisions; but a fortiori. At this stage, evidence had begun to emerge that the symptoms of BA’s illness were returning, with clear potential consequences for his manageability in detention. A UKBA official had formed his own view, and reported it to those responsible for maintaining detention, that BA was unfit to be interviewed about his asylum claim. That official also reported that BA was saying that his medication had run out.

(ii) was BA falsely imprisoned?

219. I do not consider that at this stage the *Hardial Singh* principles were breached. BA had been detained in Harmondsworth IRC at this stage for 84 days. There was evidence that he was becoming unwell, but it was not clear that his illness was serious enough to make it impossible for him to be removed within a reasonable time. However, the less likely it became that he could be interviewed within a reasonable time about his asylum claim, the more likely it would be that these principles would be breached in the future, especially in circumstances where the balance of the evidence suggests that detention was likely to worsen BA’s illness, and that it was, in fact, getting worse.

(iii) would BA have been entitled to damages?

220. I would also hold, if the issue arose, that the Secretary of State could lawfully have continued to detain BA at this stage, and would have done so, if she had followed her own policy. Although there were now signs of a recurrence of BA’s illness, there was, as yet, no evidence that it could not be satisfactorily managed in detention. BA was no longer stable but there was no reason to think his illness was so serious that it could not, at that stage, be managed in detention

(5) the refusal to grant temporary admission on 14 April 2011

221. Similar reasoning applies to that decision as to the decision of 26 April 2011.

(f) the decision of 19 May 2011

(i) was there a breach of the policy?

222. By this stage, BA was on the waiting list to see a psychiatrist, and had been seen by a GP who recorded signs of mental disturbance in the medical notes. Again, in my judgment the paragraph 55.10 of the policy was a relevant consideration, and it was ignored. Moreover, the emerging illness meant that a more careful approach to the weight to be accorded to the actual risks likely to be posed by BA’s release is called for than is apparent in this decision.

(ii) was BA falsely imprisoned?

223. I consider that there was no breach of the *Hardial Singh* principles at this stage. BA had been detained at Harmondsworth IRC for 112 days. He was clearly becoming ill again, but I consider that it was possible that removal would occur within a reasonable time, if this proved to be a transient episode. However, a further deterioration in his mental state could call into question the likelihood of removal within a reasonable

time, as it would postpone the point at which his asylum interview could be conducted. Moreover, it was clear by this stage that detention was beginning to have the effect on BA's health which had been predicted by Dr Khalifa; and the effect of detention on the individual is one of the factors which is relevant under these principles. A point could be reached where, taking into account the NOMS assessment of the risk posed by BA, his continued detention would breach those principles.

(iii) would BA have been entitled to damages?

224. I would also hold, if the issue arose, that the Secretary of State could lawfully have continued to detain BA at this stage, and would have done so, if she had followed her own policy. The signs of relapse were now more pronounced but, there was, as yet, no evidence that it could not be satisfactorily managed in detention. While BA was not stable, there was no reason to think his illness could not, at that stage, be managed in detention

(6) the decision of 17/21 June 2011

(i) was there a breach of the policy?

225. This review was not completed within 28 days of the previous review, in breach of the policy.

226. I also consider that, even if I can assume that the caseworker had paragraph 55.10 in mind, the consideration given to this part of the policy was inadequate. There was now a clear issue about whether BA's illness could be managed in detention, and if it could not, a need to "weigh carefully" the risk of further offending and harm to the public against BA's mental illness. I do not consider that these factors were properly marshalled or assessed. At this stage, the only extant NOMS assessment indicated that the relevant risks were low. This assessment is not anywhere adverted to in the detention reviews. None of the checklists which should have brought this to the decision makers' attention had been filled in. One of the reasons given for detention, "continued treatment in the interest of the subject", was for reasons I gave earlier (see paragraph 153, above), an irrelevant consideration on the facts of this case.

(ii) was BA falsely imprisoned?

227. BA had been detained in Harmondsworth IRC for 156 days. By this stage, it was and had been clear for some time that detention was having a serious effect on BA's mental and physical health. I consider that, on the balance of probabilities, BA's symptoms were genuine, and that his refusal of food and drink, and of other interventions designed to help him, was not a rationally conceived strategy. But even if it had been, a point had been reached where the negative effect of detention on BA's health, coupled with the fact that this effect was likely to postpone any decision on his asylum claim, meant that detention had ceased to be for a reasonable period. BA had, by this stage, been taken to hospital several times to be re-hydrated. He had been refusing food and drink for some 30 days. As long ago as 27 April 2011, Mr Agbeni had asked for "a specific, time-bound plan within which the subject will be fit to be interviewed". It should, by now, have been obvious that none could be provided until BA had recovered, and that he would not do so for so long as he continued to be detained. I hold that, as at 21 June 2011, the *Hardial Singh* principles were breached by BA's continued detention. So at this point, it ceased to have a statutory warrant, and BA was falsely imprisoned.

(iii) would BA have been entitled to damages?

228. Chapter 55 incorporates the *Hardial Singh* principles as an overriding consideration (see the proviso to the fifth sentence of paragraph 55.1). So I would also hold, if the issue arose, that the Secretary of State could not lawfully have continued to detain BA at this stage, and would not have done so, if she had followed her own policy.

(7) the decision of 18/19 July 2011

(i) was there a breach of the policy?

229. A fortiori the previous month's decision, the consideration of paragraph 55.10 was inadequate. Again, one of the reasons given for detention, "continued treatment in the interest of the subject", was for reasons I have given earlier, an irrelevant consideration on the facts of this case. By now, Mr Agbeni had been told that it was "impossible to predict" when BA would be fit to be interviewed. When he was weighed on 11 July 2011, he had lost 2.3 kg in a week. A crescendo of professional voices expressed the view in the course of July that he was unfit to be detained.

(ii) was BA falsely imprisoned?

230. A fortiori the position in June, the *Hardial Singh* principles were breached.

(iii) would BA have been entitled to damages?

231. As with the previous month, and for the same reason, I would also hold, if the issue arose, that the Secretary of State could not lawfully have continued to detain BA at this stage, and would not have done so, if she had followed her own policy.

(i) the high level reviews of 29 July and 1 August 2011

232. The position is not changed by either of these reviews.

(8) the decision of 12 August 2011

233. Nor is the position changed by this decision. By now BA had been transferred to Hillingdon Hospital. But by 28 July, he had been close to death. There is no reference at all to paragraph 55.10, although this decision and the next one are on a form with a specific heading about "mental health issues" and describe BA's transfer to Hillingdon Hospital under section 48, and the fact that he began refusing food and drink in May 2011, "which has had an adverse effect on his physical condition". The reasoning in support of the recommendation in this review, and the next, is very similar, and generic.

(9) the decision of 21 September 2011.

234. Nor is the position changed by this decision. The view expressed at the CPA review was that BA had recovered enough to be transferred back to detention, but the doctor treating him made clear that it was no secret that the reason for his improvement was that he was not being detained. In my judgment, and despite this recovery, it was a breach of the *Hardial Singh* principles for him to be detained. There is now clear evidence of the effect of prolonged immigration detention on his physical and mental health. If he returns from hospital to Harmondsworth IRC, it is probable that the cycle of decline will resume, and there can not be complete confidence that his condition would be monitored and treated appropriately. The apparent lack of co-ordination between Harmondsworth IRC and the local hospital means that there is a risk, that, once again, there will be significant delay if it is again necessary (as it

seems probable that it will be) to transfer him under section 48 of the 1983 Act. This conclusion is reinforced by the fact that he now has an outstanding appeal to the FTT, although I appreciate that this was not known to the decision maker on 21 September 2011.

235. This is not to say that any further detention of BA would breach the principles in *Hardial Singh*. Any assessment would depend on the facts at the time, and on any up-to-date medical evidence. Detention for what is, at the point of detention, likely to be a period of unknown length (but likely to be several months), would, in my judgment, be likely to be such breach, whereas detention for what is likely a short period (measured in weeks) might well not be.

(B). Articles 3 and 8

236. In my judgment there was a deplorable failure, from the outset, by those responsible for BA's detention to recognise the nature and extent of BA's illness. This may well have contributed to the complete absence of any monitoring of BA's condition in the early stages of his detention (from 1 February to 30 March 2011). Although he first showed signs of disturbance on the latter date, and was plainly unfit for interview on 8 April 2011, he was not seen by a psychiatrist until 21 May 2011. At the time of the proposed interview, someone had forgotten to give him his medication for about a week. All of this in turn may have contributed to his gradual relapse, and then his determined, and persistent, refusal of food and drink, with dire consequences for his physical health. Even then, his eventual transfer to hospital was significantly delayed for various reasons. I reject Mr Kellar's submission that this delay is not the responsibility of the Secretary of State. The Secretary of State had put BA in this position, by detaining him when it was known that it was likely that such detention would set in train this chain of events.

237. I do not consider, however, that the article 3 threshold was reached until 4 July, when Valerie Anderson reported her view that he was "in such poor physical condition that he should now be considered unfit to be detained". In coming to this conclusion, I have taken into account the fact that, if the Secretary of State had acted lawfully, she could and would have detained BA until 21 June 2011. I have also taken into account that even if BA's refusal of food and drink was caused by his illness, rather than (as the Secretary of State's officials have at various times implied) wilfully, it is extremely difficult to deal with such behaviour in a way which both respects personal dignity and autonomy, and also safeguards health. Nor has anyone charged with his welfare deliberately set out to cause him suffering or distress. But I do consider that there has been a combination of bureaucratic inertia, and lack of communication and co-ordination between those who were responsible for his welfare. The documents disclosed by the Secretary of State have also shown, on one occasion, a callous indifference to BA's plight. If I am wrong about this, and the article 3 threshold was not breached, I would hold that, at this point, the Secretary of State infringed BA's article 8 rights by continuing to detain him.

238. I consider that those breaches ceased when BA was again transferred to hospital, on 6 August 2011.

E. Conclusion

239. My conclusions are:

- a. Despite the various breaches of the Secretary of State's policy which I have described, the statutory warrant for BA's detention was not undermined until 21 June 2011, at which point the further detention of BA breached the *Hardial Singh* principles.
 - b. He is entitled to damages for false imprisonment, to be assessed, from that date until the date when the Secretary of State released him pursuant to the interim order I made on 7 October 2011.
 - c. BA's article 3, alternatively, article 8, rights were breached by his detention between 4 July and 6 August 2011.
240. I will hear submissions about the consequences of this judgment, unless the terms of an order can be agreed.
241. I should mention that at the end of the hearing on 7 October I ordered that BA be released on conditions. Despite the Secretary of State's apparent views about the risk of absconding, those agreed conditions did not include an electronic tag. Mr Buley indicated that BA was willing to submit to a tag, and I added that condition. I had been told by Mr Kellar, after lunch that day, that the Secretary of State had, earlier that day, transferred BA to Harmondsworth IRC from Hillingdon Hospital. The Secretary of State had not, as required by an interim order made by HHJ Pearl QC, given BA's solicitors 72 hours' notice of her intention to do this. He was without instructions. He apologised, but was unable to explain why this had been done. On 10 October 2011, Mr Jack Noble for the Treasury Solicitor wrote to the Administrative Court Office, apologising again. He explained that although the Court's interim order had been held on file both by Harmondsworth IRC and by Hillingdon Hospital, it seems to have been "overlooked" by them. It also seems that the official at the Ministry of Justice who drew up the remission warrant for BA did not know about the order at all. Mr Buley reserves his position about this apparent breach of the order.
242. Finally, this case was initially listed for one day. It should have been, and in the course of the first day's hearing became, obvious that that estimate was inadequate. The amount of disclosure in these cases, and the nature of these claims, means that very careful consideration should be given to the accuracy of any time estimate; and any initial estimate should be reviewed, particularly once disclosure has been given.